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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 191

THE UNITED STATES OF AMERICA, PETITIONER

vs.

CLARENCE P. ARZNER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 1, 1932
CERTIORARI GRANTED OCTOBER 10, 1932

(36888)

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Record from D. C. U. S., Western Washington	1	1
Complaint	1	1
Answer	4	4
Reply	8	8
Minute entries of trial	11	11
Verdict	14	14
Order extending time	14	14
Judgment	15	15
Motion for new trial	17	17
Order denying motion for new trial	18	18
Stipulation re bill of exceptions	19	19
Order extending time	20	20
Petition for appeal	21	21
Notice of appeal	22	22
Assignments of error	23	23
Order allowing appeal	26	26
Stipulation waiving assignments of error	26	26
Stipulation re original exhibits	27	27
Order to transmit original exhibits	28	28
Defendant's proposed bill of exceptions	29	29
Caption	29	29
Admitted facts	30	30
Testimony of Clarence P. Arzner	31	31
Motion for nonsuit	34	34
Testimony of C. R. Christie	36	36
Defendant's motion for directed verdict	37	37
Instructions to jury	37	37
Order settling bill of exceptions	45	45

	Original	Print
Record from D. C. U. S., Western Washington—Continued.		
Præcipe for transcript of record	47	47
Clerk's certificate	48	48
Citation and service	50	50
Proceedings in U. S. C. C. A., Ninth Circuit	52	53
Order of submission [omitted in printing]	53	53
Order directing filing of opinion and judgment	54	53
Opinion, Wilbur, J	55	53
Judgment	61	58
Order staying issuance of of mandate	62	58
Clerk's certificate [omitted in printing]	63	58
Order allowing certiorari	64	59

NAMES AND ADDRESSES OF COUNSEL.

Messrs. ANTHONY SAVAGE and TOM DEWOLFE, Attorneys for Appellant, 310 Federal Building, Seattle, Washington.

Mr. LESTER E. POPE, Attorney for Appellant, 800 Liggett Building, Seattle, Washington.

Messrs. CHADWICK & CHADWICK, and Mr. ORVILLE H. MILLS, Attorneys for Appellee, 660 Central Building, Seattle, Washington. [1*]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 20032

CLARENCE P. ARZNER,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT.

Plaintiff complains of the defendant, and for his cause of action alleges:

I.

That plaintiff is a resident of the above named judicial district of the United States, to-wit, the Western District of Washington, Northern Division, residing at Seattle, Washington.

*Page number appearing at the foot of page of original certified Transcript of Record.

II.

That on or about the 29th day of March, 1918, plaintiff enlisted in the 91st Division, Company "C", 316th Engineers of the United States Army at Camp Lewis, Washington; that thereafter he served in the above division, and was honorably discharged from said Army on the 16th day of January, 1919, at Camp Dodge, Iowa.

That immediately after entering said Army plaintiff applied for a policy of War Risk Insurance in the sum of ten thousand ($10,000) dollars, and thereafter there was deducted from his monthly pay a premium for said insurance. That a certificate of War Risk Insurance was duly issued, by the terms whereof the defendant agreed to pay the plaintiff the sum of [2] fifty-seven & 50/100 ($57.50) dollars per month in the event he suffered total and permanent disability, but that said policy was never delivered to the plaintiff; that said policy was kept in full force and effect until on or about the 16th day of January, 1919.

III.

That in the month of September, 1918, the plaintiff was shell-shocked in the Argonne Sector, as a result of which he developed psychoneurosis neurasthenia with hysterical manifestations; that he has had at all times since said date a general nervousness, insomnia, muscle jerking and twitchings, and facial spasms; that at all times since September, 1918, he has suffered from said afflictions and disabilities; that plaintiff has been informed and believes, and therefore alleges as true, that the afore-

said diseases and disabilities are permanent in their nature, and that he will never recover therefrom.

IV.

That by reason of the foregoing plaintiff, prior to his discharge from the Army, and while his insurance was still in full force and effect, became permanently and totally disabled from following any steady or gainful occupation, and has been informed and believes, and therefore alleges as true, that he will always be so disabled, and will never again be able to follow any substantially gainful occupation; by reason whereof the plaintiff became entitled to receive from the defendant the sum of fifty-seven & 50/100 ($57.50) dollars a month from and after September, 1918 [3]

V.

That plaintiff has made due proof of said disabilities and demanded the aforesaid payments, but that defendant has disagreed with him as to his claims and disabilities, and has refused to pay the same to him, or any part thereof.

WHEREFORE, plaintiff prays judgment against the defendant in the sum of fifty-seven & 50/100 ($57.50) dollars per month, commencing with the month of September, 1918, until rendition of verdict herein, together with his costs and disbursements herein.

STEPHEN F. CHADWICK,
THEODORE D. CARLSON,
Attorneys for Plaintiff.

Office and Postoffice Address:
448 Central Building, Seattle, Wash. [4]

State of Washington,
County of King—ss.

Clarence P. Arzner, being first duly sworn, on oath deposes and says: That he is the plaintiff in the within entitled action, that he has read the foregoing complaint, knows the contents thereof, and believes the same to be true.

CLARENCE P. ARZNER

Subscribed and sworn to before me this 20 day of December, 1928.

[Seal] THEODORE D. CARLSON,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed Mar. 5, 1929. [5]

(Title of Court and Cause.)

ANSWER.

Comes now the defendant in the above entitled action, by Anthony Savage, United States Attorney for the Western District of Washington, and Tom De Wolfe, Assistant United States Attorney for said District, and Lester E. Pope, Regional Attorney for the United States Veterans Bureau, and for answer to the complaint of the plaintiff herein, admits, denies and alleges as follows:

I.

For answer to paragraph I of plaintiff's complaint, defendant denies each, every and singular the allegations therein contained.

II.

For answer to paragraph II of plaintiff's complaint, defendant denies each, every and singular the allegations therein contained.

III.

For answer to paragraph III of plaintiff's complaint, defendant denies each, every and singular the [6] allegations therein contained.

IV.

For answer to paragraph IV of plaintiff's complaint, defendant denies each, every and singular the allegations therein contained.

V.

For answer to paragraph V of plaintiff's complaint, defendant denies each, every and singular the allegations therein contained, with the exception that it is admitted a disagreement exists between the plaintiff and defendant herein.

For a FURTHER ANSWER and by way of a FIRST AFFIRMATIVE DEFENSE, defendant doth allege as follows:

I.

That on June 25, 1918, the plaintiff applied for and was granted War Risk Insurance in the amount of $10,000, payable in monthly installments of $57.50 each in the event of his death or permanent and total disability; that premiums on this term insurance contract were paid to include January, 1919; that the contract lapsed for failure to pay the premium due February 1, 1919; that effective

March 1, 1920, the plaintiff reinstated and converted his original $10,000 term insurance to an ordinary life contract upon which he paid premiums to include February, 1921; that on February 28, 1921, the plaintiff requested that his $10,000 ordinary life policy be reduced to a $5000 ordinary life policy effective March 1, 1921; that he also requested that he be paid the cash surrender value for the $5000 of the insurance which he discontinued; that a check for [7] $45.20, representing the cash surrender value, was forwarded to the plaintiff on April 29, 1921; that thereafter the plaintiff demanded the cash surrender value on the remaining $5000 ordinary life policy and a check for $18.30, representing the cash surrender value of this policy, was mailed to the insured on December 29, 1921; that the reinstatement of the $10,000 term insurance and the conversion of the same to an ordinary life policy issued effective March 1st, 1920, constituted a merger and novation of the original term insurance contract to the ordinary life policy, and all rights under the original insurance contract became and were merged in the ordinary life policy, which has been surrendered for its cash surrender value.

For a FURTHER ANSWER, and by way of a SECOND AFFIRMATIVE DEFENSE, defendant alleges as follows:

I.

The allegations of the first affirmative defense are expressly referred to in this second affirmative defense and incorporated herein by reference the

same as if said allegations were pleaded and set forth in this second affirmative defense verbatim; that when plaintiff applied for reinstatement of his term insurance and for the conversion of the same, as pleaded herein, he represented to the defendant that he was not then permanently and totally disabled; that plaintiff is now therefore, estopped from claiming permanent and total disability at or prior to the time of the reinstatement and conversion pleaded herein. [8]

WHEREFORE, having fully answered the complaint of the plaintiff herein, defendant prays that the same be dismissed with prejudice, and that the defendant may go hence with its costs and disbursements herein to be taxed according to law.

ANTHONY SAVAGE,
United States Attorney.
TOM De WOLFE,
Assistant United States Attorney.
LESTER E. POPE,
Regional Attorney, United States Veterans Bureau.

United States of America,
Western District of Washington,
Northern Division—ss.

Tom De Wolfe, being first duly sworn, on oath deposes and says: That he is Assistant United States Attorney for the Western District of Washington, and as such makes this verification for and on behalf of the United States of America, defend-

ant herein; that he has read the foregoing Answer, knows the contents thereof, and believes the same to be true.

TOM De WOLFE.

Subscribed and sworn to before me this 30th day of April, 1929.

[Seal] T. W. EGGER,

Deputy Clerk, United States District Court, Western District of Washington. [9]

Received a copy of the within Answer this 30 day of April, 1929.

S. F. CHADWICK,
T. D. CARLSON,
Attorney for Pltf.

[Endorsed]: Filed May 1, 1929. [10]

(Title of Court and Cause.)

REPLY.

Comes now the plaintiff, and replying to the affirmative defenses set forth in the answer herein, admits, denies and alleges as follows:

I.

Replying to paragraph I of the first affirmative defense, plaintiff admits the contract of insurance of June 25, 1918, and that premiums were paid thereon to include January, 1919, but denies that said contract of insurance of June 25, 1918, lapsed for failure to pay premium due February 1, 1919;

and affirmatively alleges that said contract was at said time matured as in his said complaint set forth.

Plaintiff admits that on or about March 1, 1920, this plaintiff then being a ward of the defendant and receiving compensation and training because of his war-time service disability, and in ignorance and mistake of fact as to his rights, and at the solicitation and urging of defendant's agents, signed documents, the exact nature thereof being to plaintiff unknown, and that until February, 1921, plaintiff made payments to the defendant because thereof at which time, being unable to meet said payments because of his physical condition as set forth in the complaint herein, defendant through its agents [11] arranged for a reduction thereof, the exact nature of which is to plaintiff unknown, and that defendant unable to meet the payments requested and arranged for by defendant's agents, said agents arranged for a return of some of the sums theretofore paid by plaintiff to defendant, the exact amount thereof being to plaintiff unknown.

Plaintiff further denies each and every other allegation in said first affirmative defense contained.

II.

Replying to paragraph I of the second affirmative defense, plaintiff repeats his reply to the allegations of the first affirmative defense, and incorporates the same herein by reference, and denies each and every other further allegation in said second affirmative defense contained.

WHEREFORE, having fully replied, plaintiff prays as in his complaint herein.

STEPHEN F. CHADWICK and
THEODORE D. CARLSON,
Attorneys for Plaintiff. [12]

United States of America,
State of Washington,
County of King.—ss.

Clarence P. Arzner, being first duly sworn on oath, deposes and says: That he is the plaintiff in the above entitled action; that he has read the foregoing reply, knows the contents thereof and that the same is true as he verily believes.

CLARENCE P. ARZNER.

Subscribed and sworn to before me this 11th day of May, 1929.

(Seal) M. D. MATTHEWS,
Notary Public in and for the State of Washington, residing at Seattle.

Received a copy of the within Reply this 18 day of May, 1929.

ANTHONY SAVAGE
Attorney for Pltf.

[Endorsed]: Filed May 21, 1929. [13]

(Title of Court and Cause.)

TRIAL.

Now on this 3rd day of June, 1931, S. F. Chadwick, Esq., and Orville H. Mills, Esq., appearing as counsel for the plaintiff and Tom DeWolfe, Assistant United States District Attorney, and L. E. Pope, Legal Advisor of the United States Veterans' Bureau, appearing for the defendant, this cause is called for trial at 2:15 P. M. with both sides being ready. A jury is impanelled and sworn as follows: Mrs. Lois J. Thompson, J. H. Bradley, E. B. Snyder, Frank Hart, J. M. Ausman, H. D. Carlson, G. E. Olson, A. E. Tanson, Sarah H. Shull, Ira W. Minnihan, W. B. Cochrane, and Fred Jamieson. The plaintiff's witnesses are present and are sworn in a group. Admitted facts are admitted in the record and opening statements are made to the jury by counsel f r both sides. Witnesses testifying for the plaintiff under oath are as follows: Clarence P. Arzner, Dr. Donald A. Nicholson. The plaintiff's exhibits numbered 1 and 2 are admitted in evidence. The defendant's exhibits numbered A-1, A-2, A-3 and A-4 are identified and denied as being part of the defense. Exhibit numbered A-5 is identified. The jury is admonished at 4:60 P. M. and the trial is ordered continued to 10 A. M. tomorrow.

Journal No. 19 at Page 395. [14]

(Title of Court and Cause.)

TRIAL RESUMED.

Now on this 24th day of June, 1931, trial of the above entitled cause is resumed pursuant to adjournment with all jurors and parties present. Witnesses testifying for the plaintiff under oath are as follows: Dr. F. G. Nichols, Norman W. Engle, J. J. Bonnell, Wade Waters, Walter B. Mason, J. S. Christy, and Wilmer Arzner. The defendant's exhibits numbered A-6 to A-13, inclusive, are admitted in evidence. The plaintiff rests at 11:45 A.M. and the jury is admonished and excused until 2 P.M. while a question of law is argued as to the plaintiff's right to sue. Recess is taken until 2 P.M., at which time all jurors and parties being present the trial is resumed. The defendant now moves for a non-suit on grounds stated in the stenographic record, and the court overrules the same on all grounds except the third named, the plaintiff's right to sue, on which further arguments are heard, and the motion then overruled in its entirety, and an exception noted. Witnesses for the defendant testifying under oath are as follows: Dr. W. D. Lundsford, Dr. G. I. Birchfield, H. B. Flanders, C. J. Johnston, Thad McGlinn, Wm. N. Schlax. The defendant's exhibits numbered A-1 to A-5, inclusive, are now offered and admitted in evidence. The deposition of John Coolin is published and read to the jury. The deposition of Lorentz H. Stenvig is now published and

it being 4:35 P.M. the reading is deferred until 10 A.M. tomorrow at which time the trial will be resumed.

Journal No. 19 at Page 407 [15]

(Title of Court and Cause.)

Now on this 25th day of June, 1931, trial of the above entitled cause is resumed pursuant to adjournment with all jurors and parties present. Witnesses testifying under oath for the defendant are as follows: Dr. Lawrence R. Quilliam, C. R. Christy, Stenvig deposition is read to the jury. The defendant's exhibits numbered A-14, A-15, A-16 are admitted in evidence. The plaintiff's exhibit numbered 3 is admitted in evidence. Exhibit numbered 4 is denied. The defendant rests. Rebuttal witnesses are as follows: Clarence P. Arzner. Both sides rest at 11:30 A.M. Counsel for the defendant moves for a directed verdict on the same grounds urged on its motion for a nonsuit. The same is denied and separate exception is noted as to each separate ground of the motion. Arguments of counsel are begun and at 11:43 A.M. recess is had to 1:30 P.M., at which time all jurors and parties are present and the trial is resumed and arguments are concluded. The jury is instructed. No Exceptions. Whereupon the jury retires at 2:50 P.M. in charge of bailiffs to deliberate of a verdict. At 4:35 P.M. the bailiffs are instructed that if a ver-

dict is agreed upon before 6 P.M. it is to be sealed and returned into court by the foreman at 10 A.M. tomorrow. If a verdict is not agreed upon before 6 P.M. the jurors are to be allowed to separate and go to their homes and resume their deliberation at 9 A.M. tomorrow.

Journal No. 19 at Page 412. [16]

(Title of Court and Cause.)

VERDICT.

We, the jury in the above-entitled cause, find for the Plaintiff, and that he became totally and permanently disabled on the 29 day of September, 1918.

W. B. COCHRANE,
Foreman.

[Endorsed]: Filed Jun 26, 1931. [17]

(Title of Court and Cause.)

TRIAL RESUMED.

(Order extending Time for Lodging Bill of Exceptions)

Now on this 26th day of June, 1931, at the incoming of court at 10 A.M. the jury returns into court with a sealed verdict which is as follows, to-wit: "We, the jury in the above-entitled cause, find for the Plaintiff, and that he became totally

and permanently disabled on the 29 day of September, 1918. W. B. Cochrane, Foreman." Roll call of the jury shows all present. The verdict is received, read, acknowledged by the jury and ordered filed. The jury is excused from the cause and until 10 A.M. next Tuesday. The defendant is given ninety (90) days in which to lodge proposed bill of exceptions. [18]

United States District Court, Western District of Washington, Northern Division.

No. 20032

CLARENCE P. ARZNER,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT.

The above entitled cause having come on regularly for trial on the 24th day of June, 1931, before the Honorable Colin Neblett, one of the judges of the above entitled court and plaintiff appearing in person and by his attorneys Chadwick and Chadwick, and defendants, United States of America by its attorneys Tom De Wolfe and Lester E. Pope, regional attorney for the United States Veterans' Bureau, and a jury of twelve persons having been

duly and regularly impanelled and sworn to try the said cause, and witnesses on the part of plaintiff and on the part of defendant having been sworn and examined and evidence being duly introduced by the plaintiff and by the defendant and the attorneys for the plaintiff and the defendant having made their arguments after the hearing of the evidence and the court having instructed the jury as to the law and the jury having duly considered the evidence and the court's instructions, the jury retired to consider their verdict and subsequently returned into the court upon the 26th day of June, 1931, with their verdict signed by the foreman and the jury being called, answered to their names and said that they found a verdict in favor of the plaintiff and against the defendant, finding that the plaintiff became totally and permanently disabled on the 29th day of September, 1918. [19]

Now, therefore, it is ORDERED, ADJUDGED and DECREED that the plaintiff have and recover of and from the defendant United States of America, the monthly installments of insurance payable under the contract of War Risk Insurance issued by said defendant to the plaintiff, as remaining unpaid upon the 26th day of June, 1931, being the time of the rendition of the verdict herein, to-wit: the sum of $8797.50.

It is further ORDERED, ADJUDGED and DECREED that Stephen F. Chadwick is entitled on behalf of the attorneys for the plaintiff to receive from said judgment as a reasonable attorneys fee for the services of the attorneys for the plain-

tiff in the above entitled cause a sum equal to 10 per cent of the aforesaid sum of $8797.50, together with 10 per cent of each of the additional monthly installments of $57.50 to be paid under or in consequence of this judgment, said fee to be paid by the United States Veterans' Bureau out of the payments to be made and as they are made under or in consequence of this judgment, said payments to be made as by law in such cases provided.

To all of which defendant excepts and its exception is allowed.

Done in open court this 30th day of June, 1931.

COLIN NEBLETT,
Judge.

Presented by
CHADWICK & CHADWICK,
By ORVILLE H. MILLS.

Received a copy of the within Judgment this 30 day of June, 1931.

ANTHONY SAVAGE,
Attorney for Deft.

[Endorsed]: Filed Jun 30, 1931. [20]

(Title of Court and Cause.)

MOTION FOR NEW TRIAL.

Comes now the defendant, the United States of America, by Anthony Savage, United States Attorney for the Western District of Washington, Tom DeWolfe, Assistant United States Attorney for said

District, and Lester E. Pope, Regional Attorney, United States Veterans' Bureau, and petitions the above Court for an order granting a new trial in the above entitled cause, for the following reasons, to wit:

1. Error in law occurring at the trial and duly excepted to by the defendant.

2. Insufficiency of the evidence to justify the verdict.

ANTHONY SAVAGE,
United States Attorney,
TOM DeWOLFE,
Asst. United States Attorney,
LESTER E. POPE,
Regional Attorney United States Veterans Bureau.

Received a copy of the within Motion this 23 day of July, 1931.

CHADWICK & CHADWICK,
ORVILLE H. MILLS,
By F. A. L.
Attorneys for

[Endorsed]: Filed Jul. 23, 1931. [21]

(Title of Court and Cause.)

ORDER DENYING MOTION FOR NEW TRIAL.

The defendant in the above entitled action, having filed herein a motion for a new trial,

Now, therefore, it is ORDERED, that the motion of the defendant for a new trial herein be denied, to which ruling defendant excepts and its exception is hereby allowed.

Done in open court this 31st day of August, 1931.

COLIN NEBLETT,
Judge.

Presented by
CHADWICK & CHADWICK,
By ORVILLE H. MILLS.

O.K. as to form.
TOM DeWOLFE,
Asst. U. S. Atty.

Received a copy of the within Order this 27 day of Aug., 1931.

ANTHONY SAVAGE,
Attorney for Deft.

[Endorsed]: Filed Sep. 8, 1931. [22]

(Title of Court and Cause.)

STIPULATION.

It is hereby STIPULATED between the parties to the above entitled action, by and through their respective attorneys of record, that the defendant herein may have up to and including the 25th day

of October, 1931, in which to lodge and have settled its proposed Bill of Exceptions herein.

Dated this 4th day of September, 1931.

ANTHONY SAVAGE,
United States Attorney,
TOM DeWOLFE,
Asst. United States Attorney,
CHADWICK & CHADWICK,
Attorney for Plaintiff.

[Endorsed]: Filed Sep. 16, 1931. [23]

(Title of Court and Cause.)

ORDER.

Upon application of the defendant herein, and pursuant to stipulation of both parties, it is hereby ORDERED that defendant herein may have up to and including the 25th day of October, 1931, in which to lodge its proposed Bill of Exceptions herein, and have same settled.

DONE IN OPEN COURT this 17th day of September, 1931.

COLIN NEBLETT,
United States District Judge.

Approved:

S. E. CHADWICK,
Attorney for Plaintiff.

[Endorsed]: Filed Sep. 16, 1931. [24]

(Title of Court and Cause.)

PETITION FOR APPEAL.

The defendant, the United States of America, feeling itself aggrieved by the order, judgment and decree made and entered in this cause on the 30th day of June, 1931, does hereby appeal from the said order, judgment and decree, and each and every part thereof, to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors herein, and said defendant prays that its appeal be allowed and citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said order, judgment and decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, as by the rules of said Court in such cases made and provided.

ANTHONY SAVAGE,
United States Attorney,
TOM DeWOLFE,
Asst. United States Attorney,
LESTER E. POPE,
Insurance Attorney, Veterans Administration, U. S. Veterans Bureau.

Received a copy of the within Petition this 29 day of Sept. 1931.

CHADWICK & CHADWICK,
Attorney for pltf.

[Endorsed]: Filed Sep. 29, 1931. [25]

(Title of Court and Cause.)

NOTICE OF APPEAL.

To CLARENCE P. ARZNER, Plaintiff, and CHADWICK and CHADWICK, Attorneys for Plaintiff:

YOU, AND EACH OF YOU, will please take notice that the United States of America, defendant in the above entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, decree and order entered in the above entitled cause on June 30, 1931, and that the certified transcript of record will be filed in the said appellate Court within thirty (30) days from the filing of this notice.

ANTHONY SAVAGE,
United States Attorney,
TOM DeWOLFE,
Asst. United States Attorney,
LESTER E. POPE,
Insurance Attorney, Veterans Administration, U. S. Veterans Bureau.

Received a copy of the within Notice this 29 day of Sept., 1931.

CHADWICK & CHADWICK,
Attorney for pltf.

[Endorsed]: Filed Sep. 29, 1931. [26]

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

Comes now the United States of America, defendant in the above entitled action, by Anthony Savage, United States Attorney for the Western District of Washington, Tom DeWolfe, Assistant United States Attorney for said District, and Lester E. Pope, Insurance Attorney, Veterans Administration, United States Veterans Bureau, and in connection with its notice of appeal herein and petition for appeal herein, assigns the following errors which it avers occurred at the trial of said cause which were duly excepted to by it and upon which it relies to reverse the judgment herein:

I.

The District Court erred in denying the motion of the defendant for a nonsuit on the following grounds:

1. That the evidence is insufficient to establish a prima facie case and is legally insufficient to sustain a verdict.

2. That the evidence affirmatively shows that the plaintiff was not permanently and totally disabled while the contract of insurance was in force and effect.

3. That the plaintiff having reinstated and converted the entire $10,000.00 of his war risk insurance on or about March 1, 1920, and in the year 1921 having surrendered the entire converted policy and accepting its cash sur- [27] render value, is not in a position to comply with the statute by sur-

render of the new contracts and, therefore, is precluded from recovering upon his term insurance policy.

II.

The District Court erred in denying the motion of the defendant for a directed verdict interposed by the defendant at the end of the entire testimony herein which motion was based upon the same grounds and reasons as the motion for a nonsuit herein to which denial the defendant excepted timely at the trial herein.

III.

The District Court erred in entering judgment upon the verdict herein when the evidence adduced at the trial of this action was insufficient to sustain the verdict or the judgment herein.

IV.

The District Court erred in denying the defendant's motion for new trial.

V.

The District Court erred in entering judgment on plaintiff's term insurance when plaintiff was unable to surrender his converted life insurance contract in compliance with the World War Veterans Act, as amended.

VI.

The District Court erred in entering judgment herein on plaintiff's term insurance contract when the plaintiff had failed and refused to make a tender of refund of the cash surrender value of the con-

verted life insurance contracts which cash surrender value was paid the plaintiff herein by the defendant.

VII.

The District Court erred in entering judgment [28] herein against the defendant on plaintiff's term insurance contract without setting off against said recovery and said judgment the amount of the cash surrender value which plaintiff received from defendant as the cash surrender value of his converted life insurance contracts.

VIII.

The District Court erred in entering judgment herein for the plaintiff and against the defendant on plaintiff's term insurance contract when the plaintiff was unable to comply with the World War Veterans Act, as amended, by surrendering his converted contract as a condition precedent to recovery on the term insurance contract.

ANTHONY SAVAGE,
United States Attorney,
TOM DeWOLFE,
Asst. United States Attorney,
LESTER E. POPE,
Insurance Attorney, Veterans Administration, U. S. Veterans Bureau.

Received a copy of the within Assignment of Errors this 29 day of Sept. 1931.

CHADWICK & CHADWICK,
Attorney for pltf.

[Endorsed]: Filed Sep. 29, 1931. [29]

(Title of Court and Cause.)

ORDER ALLOWING APPEAL.

Upon the application of the defendant, United States of America, it is hereby

ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore entered and filed herein on the 30th day of June, 1931, be, and the same is hereby allowed.

It is further ORDERED that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 28th day of September, 1931.

EDWARD E. CUSHMAN,
United States District Judge.

O.K. as to form:
CHADWICK & CHADWICK,
Attorneys for Plaintiff.

Received a copy of the within order this 29 day of Sept. 1931.

CHADWICK & CHADWICK,
Attorney for Pltf.

[Endorsed]: Filed Sep 29, 1931. [30]

(Title of Court and Cause.)

STIPULATION.

IT IS HEREBY STIPULATED between the parties to the above entitled action by and through

their respective attorneys of record that the defendant may and hereby does waive on appeal herein any and all assignments of error dealing with the insufficiency of the evidence to warrant the submission of the cause to the jury as regards the testimony adduced herein by plaintiff and his witnesses as to his physical condition and whether he was permanently and totally disabled during the time his $10,000.00 term insurance contract was in effect.

ANTHONY SAVAGE,
United States Attorney.
TOM DeWOLFE,
Asst. United States Attorney.
LESTER E. POPE,
Insurance Attorney, Veterans Administration, U. S. Veterans Bureau.
Attorneys for defendant.
STEPHEN J. & STEPHEN F. CHADWICK,
Attorneys for plaintiff.

Received a copy of the within stipulation this 3d day of Oct. 1931.

CHADWICK & CHADWICK,
Attorneys for Pltf.

[Endorsed]: Filed Oct. 3, 1931. [31]

(Title of Court and Cause.)

STIPULATION.

IT IS HEREBY STIPULATED by and between the parties to the above entitled action by and

through their respective counsel that the original exhibits of both parties admitted in evidence herein may be sent to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, in lieu of certified copies of said exhibits being so transmitted.

Dated at Seattle, Washington, this 3rd day of October, 1931.

ANTHONY SAVAGE,
United States Attorney.
TOM DeWOLFE,
Asst. United States Attorney.
LESTER E. POPE,
Insurance Attorney, Veterans Administration, U. S. Veterans Bureau.
Attorneys for defendant.
CHADWICK & CHADWICK,
Attorneys for plaintiff.

Received a copy of the within Stipulation this 3rd day of Oct. 1931.

CHADWICK & CHADWICK,
Attorneys for plaintiff.

[Endorsed]: Filed Oct 10, 1931. [32]

(Title of Court and Cause.)

ORDER

Upon stipulation of the parties to the above entitled action and the Court being duly advised in the premises, now, therefore

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Clerk of the above entitled Court be and he hereby is ordered to transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, the original exhibits herein which were admitted in evidence on behalf of both parties in lieu of certified copies of said exhibits being transmitted said original exhibits of plaintiff being numbered 1, 2 and 3, and said original exhibits of defendant being numbered A-1 to A-16, inclusive.

Done this 10th day of October, 1931.

EDWARD E. CUSHMAN,
United States District Judge.

O.K. Form
CHADWICK & CHADWICK.

[Endorsed]: Filed Oct 10, 1931. [33]

(Title of Court and Cause.)

DEFENDANT'S PROPOSED BILL OF EXCEPTIONS.

BE IT REMEMBERED that the above entitled cause came on regularly for trial on June 23, 1931, at two o'clock P.M. before the Honorable Colin Neblett, one of the judges of the above entitled Court, sitting with a jury, in the south courtroom of the Federal Building, Seattle, Washington, the plaintiff appearing in person and by his attorneys, Messrs. Chadwick and Chadwick and Mr.

Orville H. Mills, the defendant appearing by Anthony Savage, United States Attorney for the Western District of Washington, Tom DeWolfe, Assistant United States Attorney for said District, and Lester E. Pope, Insurance Attorney, Veterans Administration, United States Veterans Bureau, its attorneys and counsel;

WHEREUPON, a jury having been empaneled and sworn, and opening statements having been made by counsel for the plaintiff and for the defendant, the following proceedings were had and testimony taken, to wit:

The COURT. What are the admitted facts in this case?

Mr. POPE. It is admitted that the plaintiff enlisted on or about March 29, 1919.

It is also admitted that the plaintiff was discharged on January 16, 1919. [34]

It is admitted that while in service the plaintiff applied for and was granted $10,000.00 War Risk Insurance, on which premiums were paid to include the month of January 1919.

It is the Government's contention no further premiums were paid on the policy of insurance after that time—is that admitted by the plaintiff?

Mr. MILLS. We admit there were no premiums paid on the policy of insurance after January 1st—

Mr. POPE. (Interrupting) And, effective, March 1, 1920, the plaintiff reinstated his insurance, the original $10,000.00 insurance and converted it to an ordinary life policy, upon which premiums were then paid to include February 1921. On February

(Testimony of Clarence P. Arzner.)

28, 1921, the plaintiff surrendered $5,000.00 of that ordinary life insurance and accepted the cash surrender value of $45.20. Thereafter, on or about the latter part of 1921, the plaintiff surrendered the remaining $5,000.00 of ordinary life insurance on or about December 29, 1921, and accepted the cash surrender value of that remaining policy of that $5,000.00.

Is that admitted?

Mr. MILLS. Our reply is certain negotiations took place at that time between the insured and the government, the exact nature of which is not known to the plaintiff at this time.

The COURT. The disagreement is admitted, is it?

Mr. DeWOLFE. Yes, Your Honor, it is admitted.

The COURT. Proceed.

CLARENCE P. ARZNER, being first duly sworn on oath, testified in part as follows, on cross-examination:

That is my signature on Defendant's Exhibit A-2, more particularly the application for insurance which was the application under date of April 16, 1918. I think it is my signature on the application for insurance which is a part of Defendant's Exhibit A-2 under date of June 25, 1918 and also I think it is my signature on the application "Person

(Testimony of Clarence P. Arzner.)

Disabled in the Service" which is a part of and attached to Defendant's Exhibit A-2. That is my signature on Defendant's Exhibit A-2 which is the application for reinstatement of war risk insurance dated March 1, 1920. In regard to the document which is a part of Defendant's Exhibit A-2 headed "Release Receipt" dated the 2d of November, 1921, I will say that is my signature thereon. Also that is my signature on the release receipt which is attached to and made a part of Defendant's Exhibit A-2 and which is dated April 5, 1921. Those are my signatures on Defendant's Exhibit A-1 and on the check dated April 29, 1921 and numbered 929975 for the sum of $45.20 payable to Clarence Phillip Arzner, and that is my signature on check dated December 29, 1921 on the Treasury of the United States numbered 3169671 in the sum of $18.30 payable to the order of Clarence Phillip Arzner. Those are my endorsements thereon. That is my signature on Defendant's Exhibit A-4 and my signature is on the document attached to and made a part thereof headed "Application for Conversion of Government War Risk Insurance". That is my signature on the letter under date of February 28, 1921 which is attached to and made a part of Defendant's Exhibit A-4. It looks like my signature on Defendant's Exhibit A-3 and especially on the report of physical examination of enlisted man prior to separation from the service of the United States Army. [36]

(Testimony of Clarence P. Arzner.)

I paid no premiums on my insurance after I got out of service in January, 1919. On or about March 1, 1920 the Veterans Bureau requested me to make an application for the reinstatement of my $10,000.00 insurance and I signed the application. I signed an application for conversion of the reinstated insurance into an ordinary life policy. I signed that stuff. I didn't know what I was signing. About February 1921 I requested that I be paid the cash surrender value of $5,000.00 for my policy and that it be reduced to $5,000.00. I received some money as a cash surrender value for the first $5,000.00 converted insurance. Then the latter part of 1921 I surrendered the other $5,000.00 converted insurance and received cash for it and did not pay any more premiums on it. I did pay the premiums on the $10,000.00 policy between the time I took it out, about March 1, 1920, and 1921, when I surrendered it for cash.

Mr. POPE. We would like to make a motion to be heard on a point of law. You might as well just excuse the jury until this afternoon.

The COURT. What is the proposition?

Mr. POPE. A proposition of law under the decision of the 10th Circuit, holding where there is a subsequent policy and a man is surrendered the cash surrender value, he simply cannot meet the provision of the statute and cannot recover.

The COURT. Why wasn't that decided before the case went to trial?

(Testimony of Clarence P. Arzner.)

Mr. POPE. Affirmative matter, it was plead but of course we had to get the definite evidence here that it was, the policy was cancelled and we did not see how it could be done except to bring it out in the evidence of the [37] case. In other words, it is a question of fact as to the reinstatement and conversion and acceptance of the cash surrender value.

The COURT. Gentlemen and ladies, you may go until 2:00 o'clock. (Admonition) Jury retires.

(The following in the absence of the jury.)

Mr. CHADWICK. The matter counsel suggests is the matter I endeavored to suggest to the Court yesterday. We have met it by our reply, I believe —it is a matter to be determined upon the evidence, although an issue which the Court should then pass upon; nevertheless under the pleadings and issues as framed, this is not the time to consider or rather when the Government made their proof, and we have answered it by the reply which was filed to that affirmative matter.

Mr. DeWOLFE. I think counsel for the plaintiff has misconstrued the legal purport of the entire question involved. I think they are unfamiliar with that recent section of the Act passed last summer, which takes away from the government the defense of estoppel——

(Further argument.)

Mr. POPE. At the time, the government moves for a nonsuit on the ground (1) that the evidence is insufficient to establish a prima facie case and is legally insufficient to sustain a verdict; and (2) on

(Testimony of Clarence P. Arzner.)

the ground the evidence affirmatively shows that the man was not permanently and totally disabled while the contract of insurance was in force and effect; and (3) on the ground that the plaintiff having reinstated and converted the entire $10,000.00 of his war risk insurance on or about March 1, 1920, and in the year 1921 having surrendered the entire [38] converted policy and accepting its cash surrender value, is not in a position to comply with the Statute and, therefore, is precluded from recovering upon his term insurance policy.

The COURT. The motion is overruled except as to the third ground. I will hear your argument on the third ground.

(Argument)

The COURT. There not being any decision in this Circuit on the question here to be decided, the decision of the Tenth Circuit does not bind the Court in the trial of this case.

I feel that I ought to decide the proposition as it appears to have been decided in my District from which the appeal was taken, and I cannot decide it otherwise.

I am not compelled to follow the Circuit Court of the Tenth Circuit. I think Judge Cotteral's idea of this statute is correct. I cannot see beyond any question why this boy should now return this policy, having once returned it, to comply with the statute. It is true he cancelled it and it is no longer in effect. He has already surrendered it.

(Testimony of C. R. Christie.)

There is no use for this court to demand his doing something which he has already done.

The motion will be overruled in its entirety.

Mr. DeWOLFE. Exception, please.

The COURT. Proceed for the defense.

Whereupon the defense proceeded with its case.

Whereupon defendant offered in evidence Defendant's Exhibits A-1 and A-2 which were certified copies of checks paid to plaintiff as the cash surrender value of his policy and copies of the application plaintiff made for compensation and application for reinstatement of his insurance and two receipts and releases receipting for the money received by plaintiff as cash surrender value on certain contracts [39] which exhibits were admitted in evidence and made a part of the record herein.

Defendant's Exhibit A-3 which is the service record of the plaintiff, was admitted in evidence and made a part of the record.

Defendant's Exhibit A-4 which was plaintiff's application for conversion of his government life insurance and which also consisted of a letter under date of February 28, 1921 concerning the surrender of his insurance, was admitted in evidence.

C. R. CHRISTIE, being first duly sworn on oath, testified as follows:

My name is C. R. Christie. I am employed by the United States Veterans Bureau as a co-operator.

(Testimony of C. R. Christie.)

I have been employed by the Bureau for ten years and am familiar with the records and files of the United States Veterans Bureau with reference to compensation and insurance matters. I have examined insurance records in this case. The records show that on or about March 1, 1920 the sum of $10,000.00 of plaintiff's war risk insurance was converted into an ordinary life policy.

At the end of all the testimony the following proceedings occurred:

Mr. POPE. The government, at this time, moves for a directed verdict on the same grounds and for the same reasons as set out in support of the government's motion for a non-suit, which was interposed at the end of the plaintiff's case.

The COURT. Motion denied.

Mr. POPE. May we have a separate exception to each of the three grounds to that motion? [40]

The COURT. Yes.

Proceed with the argument, gentlemen.

(Argument of counsel.)

The COURT. Ladies and gentlemen: This is a suit upon a policy of war risk insurance. It is a suit on a contract which was entered into between the United States Government and this plaintiff while he was in the military forces of the United States. This contract is different from the law under which a person receives compensation or pen-

sions or is hospitalized or any amount of money he might receive while he is being rehabilitated. They are based upon an entirely different law.

Now, in this case, it appears from the pleadings and evidence, after the lapse of this policy, upon which the suit is brought, that the same was reinstated by the plaintiff; that he then converted it into a regular life insurance policy; before that, the policy was what is known as "term insurance".

After he had converted it into regular life, he surrrendered his policy and took the cash value which the government paid him.

Now, his reinstatement and conversion is no concern of yours; you cannot consider it in this case; it is a matter of law; the Court determines that; the Court is responsible for the law; you decide the facts in this case from the evidence as introduced.

It is admitted in this case that the plaintiff in this case enlisted in the United States military forces on March 29, 1918; that he was discharged June 16, 1919.

Mr. POPE. January 16, 1919.

The COURT. January 16, 1919—that he applied for [41] insurance in the sum of Ten Thousand Dollars and was granted an insurance policy; that the premiums on this policy were paid for the month of January, 1919; that under the law, there is a period of grace to the end of the next month, in which the policy was kept in force. This policy was in force to midnight of the last day of February 1919.

This contract—the government undertook, in this contract—if the plaintiff died to pay him this policy or if he became totally and permanently disabled while the policy was in force and effect, that they would pay him so much per month as long as he lived; and, the plaintiff, on his part, agreed and undertook to pay the monthly installments required to be paid on this policy, to keep it in force.

With these admissions, gentlemen, there is only one issue in this case, an issue of fact, as submitted to you, that is, did the plaintiff become totally and permanently disabled while this policy of war risk insurance was in force and has that disability continued to the present time?

All the testimony introduced in this case is for the purpose of informing you so you might decide this one issue properly and correctly.

A total disability is defined as follows: Any impairment of mind or body which renders it impossible for the disabled person to continuously follow any substantially gainful occupation, shall be deemed to be a total disability. A total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain it will continue throughout the life of the person suffering from it. [42]

You have heard the evidence in this case, gentlemen. The evidence has consisted of laymen who have testified as to the condition of this plaintiff, as it appeared to them the various times they have seen him.

There have been witnesses introduced on behalf of the plaintiff, that testified as to his condition, that it appeared to them soon after the injury—soon after the time he complained he received the injury from the service, that is the shell shock; and, witnesses have testified seeing him various times since then up to the present time, as to his condition, as both witnesses for the prosecution and government witnesses for the defense testified to his physical condition as it appeared to them at various times since he was discharged from the Army.

Then, we have the testimony of the various doctors, some of them who examined him soon after his return from the army and his physical record during his military service, that is in evidence before you.

Now, this Doctor's testimony is of two kinds; most of these doctors, I think all of them, probably, except one—most of them, all of them, I believe examined him. They give their testimony as to what the condition they found him in at the various times he was examined. Of course, that is testimony before you to be considered in this case; then, some of the doctors were asked their opinion as to whether or not he was totally and permanently disabled. That is an opinion—what is known in the law as "expert evidence". It is not based on the examination or things that they know; they give their opinion on hypothetical questions, that is a certain hypothesis stated to the doctor and he gives

his opinion as such doctor as to whether or not it is [43] permanent and total disability. The value of his expert opinion or testimony rests upon two propositions; first, before you can consider this opinion testimony at all, you must, from the evidence, (the hypothesis stated in the question propounded to the doctor)—the hypothesis are true, because when those hypotheses are stated to the doctor to give his opinion on, he assumes that they are true; secondly, his opinion, the value of his opinion depends, and its weight, depends upon his experience in the line of the profession in which he testifies; that is, the opinion of a doctor who had been—also, on his knowledge and study, that is the opinion of the doctor who has made a profession of nervous diseases and has considerable experience in treating nervous patients and has made a study of that particular branch of his profession, which is of more weight than a doctor who was just a general practitioner and never made a specialty of that particular disease.

So, you will take his learning and experience into consideration, when you come to consider that opinion testimony and after such consideration, you may give it such weight as it deserved; if you think it doesn't carry any weight, you will reject it altogether.

Now, there has been considerable evidence in this case concerning the occupation and work done by the plaintiff since his discharge from the Army;

that testimony is introduced here for one purpose only, so that you can take it along with all the evidence in the case, in determining the physical condition of the plaintiff. It is not absolute—whether he worked or did not work, does not conclusively settle the matter as to whether he is totally or permanently disabled or not.

The question is, if he worked, whether or not it [44] was injurious to his health or would increase the severity of the disease that he was suffering from; and, in this connection, the Court instructs you as follows:

That a period of employment or record of having worked or having received wages or salary for some particular period of time, will not preclude the plaintiff from recovering upon the war risk insurance on the ground of total and permanent disability, if throughout such period of work or receipt of such wages, there existed some disease of disability which infringed upon a substantial or gainful employment or prevented him from pursuing or performing continuously such employment without interruption, because of his disability;

And, you are further instructed that work, engaged in at the expense of his health and at the risk of aggravating his disability is not continuous pursuit of gainful employment as to preclude recovery of the policy but if, at the time of said employment, he was then and at all times disabled from shell shock, as a result of which he developed psycho-

neurosis, neurasthenia, with hysterical manifestations and if he suffered from such a disease or condition as a result of shell shock, that throughout his employment his disease gradually or progressively became worse or aggravated or harmful for him, in his state of health, to pursue employment, these conditions would not amount to continuous pursuit of a substantially gainful occupation and, if you find that during the time the policy was in full force and effect, the plaintiff suffered from a disease rendering him at all times thereafter unfit to pursue a substantially gainful occupation, you will find for the plaintiff, irrespective of such employment, even though subsequent to the beginning date of permanent total disability. [45]

In this case, gentlemen, the issue that is submitted to you, the burden of proof rests upon the plaintiff; the defendant in this case denied that the plaintiff is totally and permanently disabled or was so at the time the policy of insurance was in force and it is incumbent upon the plaintiff to establish his case by a preponderance of the evidence.

Preponderance of the evidence means the greater weight of the evidence, but this is not determined solely by the greatest number of witnesses testifying with relation to a particular fact or state of facts. It means the testimony on the part of the party upon whom the burden must have the greatest weight, in your estimation having more convincing weight.

If, in your opinion, the testimony on any essential point is evenly balanced, then the party upon whom

the burden rests to prove same by a preponderance of the evidence, must be deemed to have failed in regard thereto.

It is your duty, gentlemen, to consider all of the evidence introduced in the case and you are the sole judges of the credibility of the witnesses and the weight you will give to their testimony. It is your duty to reconcile the testimony, if you can; that is to reach the conclusion which will permit the testimony of all the witnesses stand. (If that can be done) every witness is presumed to speak the truth until the contrary appears; the contrary may appear in a number of ways; one or more witnesses may testify to a state of facts and another one or more to a state of facts directly opposite; it is, then, for you to say which you believe; one witness may state, modify or explain facts testified to by another; this may arise be- [46] cause one had better means or knowledge about that which he testifies than the other.

I will give you the proper forms of verdict; as soon as you have agreed upon a verdict, you will have it signed by your foreman and return it to the Court.

The blank spaces are left in the forms the Court submits to you. If you find in favor of the plaintiff and against the defendant, you will insert the date when you found the defendant became totally and permanently disabled.

Are there any exceptions to the Court's instructions?

Mr. CHADWICK. No exceptions.

And now, in furtherance of justice and that right and justice may be done the defendant, it prays that this, its bill of exceptions may be settled, allowed, signed, and sealed by the Court and made a part of the record.

ANTHONY SAVAGE
United States Attorney
TOM DeWOLFE
Asst. United States Attorney
LESTER E. POPE
Insurance Attorney, Veterans Administration, United States Veterans Bureau

Received a copy of the within this 8th day of Oct. 1931.

CHADWICK & CHADWICK,
Attorney for Pltf.

[Endorsed]: Lodged Oct. 8, 1931. [47]

(Title of Court and Cause.)

ORDER SETTLING BILL OF EXCEPTIONS.

The above cause coming on for hearing on application of the defendant to settle the Bill of Exceptions in this cause, counsel for both parties appearing, and it appearing to the Court that said Bill of Exceptions contains all of the material facts occurring upon the trial of the cause and all the evidence adduced at the same, together with exceptions thereto and all

of the material matters and things occurring upon the trial, except the exhibits introduced in evidence, which are hereby made a part of said Bill of Exceptions, and the parties hereto having stipulated and agreed upon said bill, the Court being duly advised, it is by the Court

ORDERED that said Bill of Exceptions be and it hereby is settled as a true Bill of Exceptions in said cause, which contains all the material facts, matters, things and exceptions therefor, occurring upon the trial of said cause and evidence adduced at same and not of record heretofore, and the same is hereby certified accordingly by the undersigned Judge of this court who presided at the trial of said cause, as a true, full and correct Bill of Exceptions and the Clerk of the Court is hereby ordered to file the same as a record in said cause and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit. [48]

IT IS FURTHER ORDERED that the Clerk of this Court attach all of the exhibits in this cause to said Bill of Exceptions, making the same a part hereof.

Dated this 13th day of October, 1931.

COLIN NEBLETT
United States District Judge

O. K.
CHADWICK & CHADWICK
Attorneys for plaintiff

Received a copy of the within bill exc— this 3rd day of October, 1931.

CHADWICK & CHADWICK,
Attorney for Pltf.

[Endorsed]: Filed Oct. 19, 1931. [49]

(Title of Court and Cause.)

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the above entitled Court:

You will please prepare certified copies of the following papers in the above entitled cause and transmit same to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit to comprise the transcript of record on appeal herein:

1. Complaint.
2. Answer.
3. Reply.
4. Trial record June 23, 1931
5. " " " 24, 1931
6. " " " 25, 1931
7. Verdict.
8. Order of June 26, 1931 granting deft. 90 days to lodge Bill of Exceptions.
9. Judgment signed by Court.
10. Motion for new trial.
11. Order of Sept. 8, 1931 denying motion for new trial.
12. Stipulation and Order filed Sept. 16, 1931 extending time for Bill of Exceptions to October 25, 1931.

13. Petition for appeal.
14. Notice of appeal. [50]
15. Order allowing appeal.
16. Assignment of Errors.
17. Citation on appeal.
18. Stipulation filed October 3, 1931 waiving assignment of error.
19. Stipulation and Order directing transmittal of original exhibits to Circuit Court of Appeals.
20. This praecipe.
21. Bill of Exceptions.

ANTHONY SAVAGE
United States Attorney
TOM DeWOLFE
Asst. United States Attorney

Copy Received this 9th day of Oct. 1931.
CHADWICK & CHADWICK
Attys for Pltf.

[Endorsed]: Filed Oct. 9, 1931. [51]

(Title of Court and Cause.)

CERTIFICATE OF CLERK OF U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify that this typewritten transcript of

record, consisting of pages numbered from 1 to 51, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same constitutes the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true, and correct statement of all expenses, costs, fees and charges incurred in my office or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, to wit: [52]

Clerk's fees, (Act of Feb. 11, 1925) for making record, certificate or return, 106 folios at 15¢ per folio,	$15.90
Appeal fee (Sec. 5 of Act)	5.00
Certificate of Clerk to Transcript of Record,	.50
Certificate of Clerk to Original Exhibits	.50
Total	$21.90

I further certify that the above cost of preparing and certifying record, amounting to $21.90 has not been paid to me for the reason that the United States Government is the Appellant.

I further certify that I transmit herewith the original citation in the above-entitled cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of the said District Court at Seattle, in said District, this 22 day of October 1931.

[Seal] ED. M. LAKIN,
Clerk of the United States District Court for the Western District of Washington,
By T. W. EGGER,
Deputy. [53]

(Title of Court and Cause.)

CITATION ON APPEAL.

United States of America
Western District of Washington.
Northern Division.—ss.

The PRESIDENT of the UNITED STATES OF AMERICA, to CLARENCE P. ARZNER, Plaintiff, and CHADWICK and CHADWICK, Attorneys for Plaintiff:

YOU, AND EACH OF YOU, are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals to be held at the City of San Francisco, California, in the Ninth Judicial Circuit, within thirty days from date hereof, pursuant to an order allowing appeal filed in the office of the Clerk of the above entitled Court, appealing from the final judgment signed and filed on the 30th

day of June, 1931, wherein the United States of America is defendant, and Clarence P. Arzner is plaintiff, to show cause, if any there be, why the judgment rendered against the said appellant, as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

WITNESSETH the HONORABLE EDWARD E. CUSHMAN, United States District Judge for the Western District of Washington, this 28th day of September, 1931.

[Seal] EDWARD E. CUSHMAN
United States District Judge.

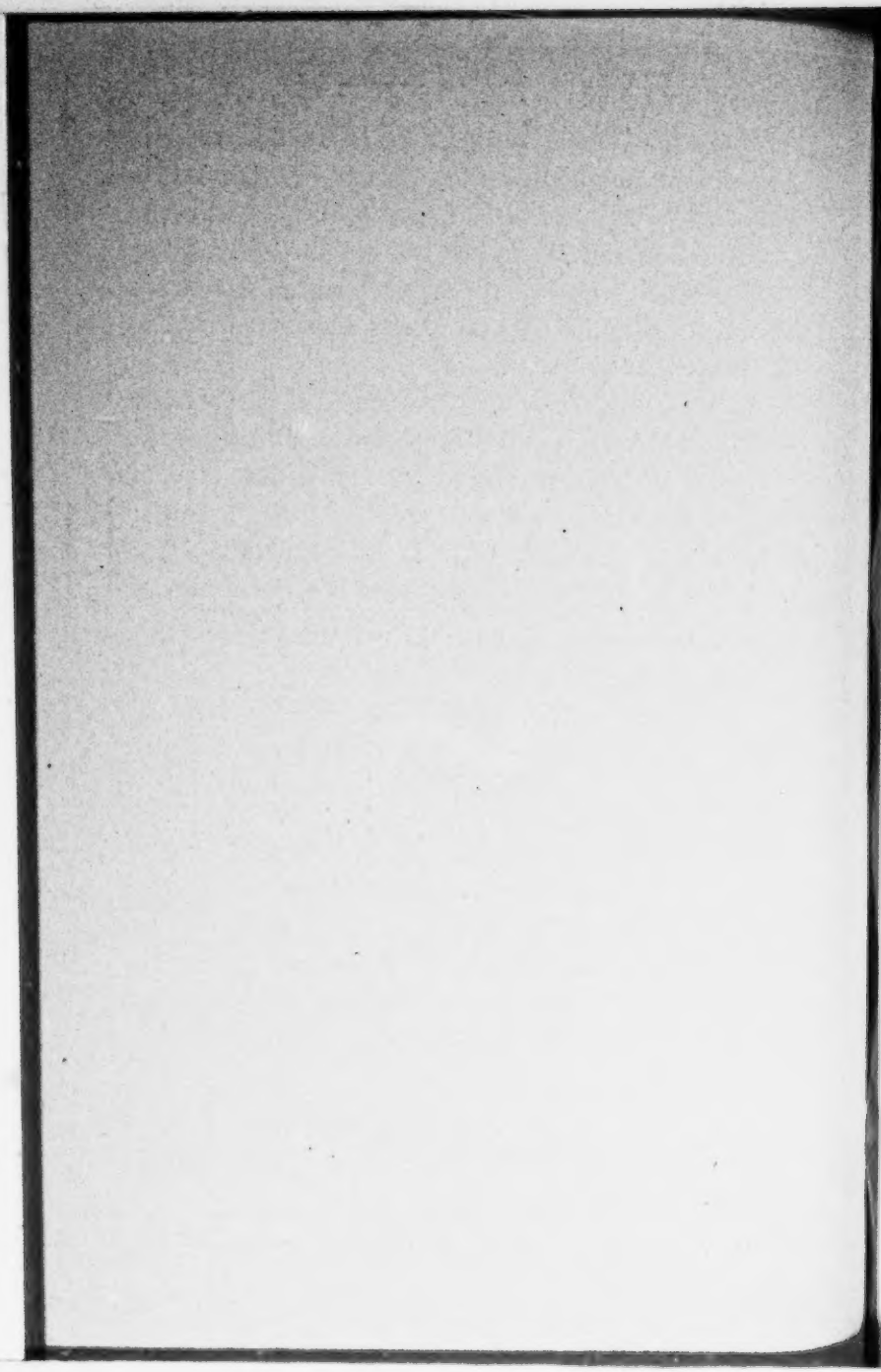
Received a copy of the within citation this 29 day of Sept. 1931.

CHADWICK & CHADWICK,
Attorney for pltf.

[Endorsed]: No. 6643. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Clarence P. Arzner, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed October 26, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.



52 [Omitted.]

53 [Order of submission, March 11, 1932, omitted in printing.]

54 In United States Circuit Court of Appeals, Ninth Circuit

No. 6643

UNITED STATES OF AMERICA, APPELLANT

vs.

CLARENCE P. ARZNER, APPELLEE

Order directing filing of opinion and filing and recording of judgment

April 4, 1932

By direction of the court, ordered that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this court forthwith in accordance with the opinion filed.

55 In United States Circuit Court of Appeals for the Ninth Circuit

No. 6643

UNITED STATES OF AMERICA, APPELLANT

vs.

CLARENCE P. ARZNER, APPELLEE

Appeal from the District Court of the United States for the Western District of Washington, Northern Division

Before WILBUR and SAWTELLE, Circuit Judges, and ST. SURE, District Judge

Opinion

Filed April 4, 1932

WILBUR, Circuit Judge:

During the life of a ten-thousand dollar war risk insurance policy the insured, Clarence P. Arzner, appellee, was totally and permanently disabled. Premiums were paid therefor until January, 1919. On March 1, 1920 the insured reinstated and converted his insurance to an ordinary life contract upon which he paid the premiums. On

February 28, 1921, plaintiff requested that this policy be reduced to $5,000, and that he paid the cash surrender value for the $5,000 insurance which he discontinued. In pursuance of this request he was paid $45.20, representing the cash surrender value of the $5,000 insurance surrendered by him at that time. Thereafter he surrendered the balance of $5,000 and was paid the cash surrender value thereof ($18.30). It is contended by the government on this appeal that inasmuch as the insured had surrendered his reinstated insurance for the cash surrender value thereof, he could not take advantage of the act of Congress of July 3, 1930, amending §307 of the World War veterans' act so as to permit a holder of subse-
56 quent veterans insurance policies to sue upon an original contract. The reason advanced is that the veteran having elected to surrender his subsequent policies for the cash surrender value was not in a position to surrender his subsequent contract or policy as required by the amendment to §307 of July 3, 1930. That amendment is as follows:

"* * * provided that the insured under such contract or policy (all contracts or policies of insurance heretofore or hereafter issued) may, without prejudicing his rights, elect to make claim to the jury or bring suit under Section 445 of this title on any prior contract or policy, and if found entitled thereto, shall, upon surrender of any subsequent contract or policy, be entitled to payments under the prior contract or policy. Provided further that this section shall be deemed to be effective as of April 6, 1917, and applicable from that date to all contracts or policies of insurance." 38 U. S. C. A. §518.

The purpose of this amendment was to meet the situation that had arisen by reason of numerous holdings of the courts to the effect that the subsequent veterans' insurance policies were novations, and that, thereafter, recovery could not be had upon the original insurance and that the ordinary principles of contract applied to the veterans' policies. Stevens v. U. S., 29 F. (2d) 904; U. S. v. Buzard, 33 F. (2d) 883; U. S. v. Kusnierz, 33 F. (2d) 887; U. S. v. Allen, 33 F. (2d) 888; U. S. v. Cross, 33 F. (2d) 887; U. S. v. Barker, 36 F. (2d) 556; U. S. v. Andrews, 43 F. (2d) 80; U. S. v. Crowell, 48 F. (2d) 475. The obvious purpose of the amendment was to permit the veteran to present to a court and jury his claim that he was totally and permanently disabled during the life of his War Risk Insurance policy and to provide that if his contention was sustained by the court and jury he should recover under the terms of the original contract notwithstanding the fact that in the subsequent dealings with the veterans bureau he had accepted some form of insurance in lieu of the original war-risk insurance. By this legislation he was not required to jeopardize his rights under the subsequent contracts or policies in order to present his claim under the superseded war-risk insurance. He could completely ignore the subsequent policies. They constituted no defense. If the

judgment was in his favor in his suit on the original policy, however, he was required to surrender any subsequent contract or policy before he was entitled to payment under the prior contract or policy.

These provisions in favor of the veteran were very liberal and definitely and purposely abrogated the rules relating to civil contracts ordinarily applicable to insurance policies. By this legislation the government not only waived its immunity from suit but also waived the defenses which might have been advanced by an insurance company. This was in the interest of justice for where the right of the veteran under his original policy had accrued by reason of his permanent and total disability he was entitled to a monthly payment of $57.50, and there was no reason why, under those conditions, he should be paying premiums upon a policy which entitled him to a payment of that amount if and when he became, as he in fact then was, permanently and totally disabled. The government admits all this, but claims that the veteran by voluntarily surrendering the subsequent policies and accepting their cash surrender value, has put himself in a position where he cannot take advantage of the statute of July 3, 1930, supra, for the reason that he cannot surrender his subsequent contract because he has already done so and received a cash consideration therefor. This view has been sustained by the Circuit Court of Appeals for the tenth circuit in United States v. Andrews, 43 F. (2d) 80.

We are unable to agree to the conclusion reached by the Circuit Court of Appeals of the tenth circuit. We think that the insured, in the case at bar, comes under both the letter and the spirit of the act of July 3, 1930. While that act authorizes the veteran to retain his rights under the subsequent contract notwithstanding he is making a claim on the original and superseded insurance, it requires a surrender of the subsequent contract as a condition precedent not to the recovery of a judgment in his action upon the first policy, but as a condition to receiving the payments adjudicated in his favor by that judgment. If he has already surrendered the policy there is no occasion to surrender it after the judgment, nor is it possible to do so. The fact that he has surrendered it for a paltry consideration which represents the return to him of a portion of the premium which he should never have been required to pay in the first place, does not change the fact that he comes within the letter of the statute in that he has surrendered the
58 subsequent policies. That he comes within the spirit of the remedial legislation of July 3, 1930, supra, seems too clear for discussion. Under the situation the insured has been paying the government, where, upon the facts as found by the jury, the government should have been paying him. It was such conditions that Congress intended to remedy by the legislation.

Furthermore, if there is anything in the surrender of the subsequent policies by the insured which differentiates it from the surrender required to be made by Congress in the amendment of July

3, 1930, supra, it lies in the fact that the surrender was for a cash consideration. The return of that consideration should and would have the same effect as the surrender of the subsequent policies. It is all the veteran can surrender under the circumstances. It is suggested that the government should at least have remitted from the amount of the judgment the amount thus paid to the veteran as the cash surrender value of the subsequent policies. While this claim is not strongly pressed, upon reflection we are satisfied that it is not tenable. It is the purpose of Congress to permit the veteran to ignore the subsequent policies of insurance in maintaining his rights under the original policy. By the verdict of the jury and the judgment of the court, it has been determined that he never should have been required to pay the premiums upon the subsequent insurance policies. In this view of the case the balance is in favor of the veteran rather than the government upon the subsequent policies, that is to say, the premiums he paid are greater than the amount returned to him by way of cash surrender value.

Furthermore, we think the claim of the government set up by way of an affirmative defense alleging the transactions which occurred under and in pursuance of the subsequent policies to be irrelevant to the issues presented to the trial court in the suit upon the original war risk insurance policies. It is the intention of Congress that such suit should be unembarrassed by subsequent transactions between the veteran and the government with relation to renewal or substituted policies. The provision with reference to the surrender of the subsequent policies relate not to the procurement of a judgment but to the right of the insured to payment thereunder. We think the phrase in the amendment of July 3, 1930, supra, "may, without prejudicing his rights, elect to make claim to the jury or bring
59 suit under section 445 of this title on any prior contract or policy, and if found entitled thereto" contemplates a suit upon the original policy unembarrassed by any subsequent transactions with the government upon "any subsequent contract or policy," and that the provision of the amended section with regard to the surrender of the subsequent contract is a condition subsequent which must be complied with in order to secure payment from the veterans bureau of the installments provided for in the judgment. The application for and the acceptance of such cash surrender payments in the light of the law would no doubt be effective to surrender any rights which the veteran might have under these subsequent contracts of insurance. The actual physical surrender of the documents and formal assent to such surrender, would no doubt be desirable and might well be insisted upon as a condition of payment. In any event, it is sufficient to say and to hold that the affirmative defense interposed by the government in the case at bar is not germane to the veteran's cause of action. This view is in accord with our decision in Herrig v. U. S., 53 F. (2d) 327, where this court, speaking through Judge Sawtelle, said:

"We believe that, under a recent statute, the defense of estoppel by virtue of reduced, converted, or reinstated policies is not open to the Government, and therefore the equitable matter set up by the plaintiff-appellant in reply to such defense, and the court's decree thereon, were of no legal effect, and constitute a futile and unnecessary gesture. That being so, the action at law on the original policy of insurance, which action was triable only before a jury, was the only cause that could be properly and was adjudicated in the court below. As to this cause, the jury found for the defendant, judgment was rendered on the verdict, and there is no reason why such verdict and judgment should be disturbed by this court."

To the same effect is the decision of the Circuit Court of Appeals of the fifth circuit in Sprencel v. United States, 47 F. (2d) 501, 504. Speaking of this remedial legislation of July 3, 1930, supra, the court said:

"If a recovery is had on the old policy or contract, then
60 before receiving payment under such a judgment, the insured is required to surrender any subsequent agreement. In other words, it seems to permit him to elect whether he will claim upon the original policy 'without prejudicing his rights' and submit the issues of fact and law as to whether he is entitled to recover thereunder, notwithstanding any subsequent contract or policy. Since it is our conclusion that the lower court erred (for reasons which later hereinafter appear) in directing a verdict and will reverse the case for a new trial, we think it well to say that this statute will hereafter exclude from the litigation any question of estoppel based upon the application for reinstatement and the alleged contract arising therefrom.

"Accordingly, we hold in the present suit that, as in the Sprencel case, supra, the question of estoppel raised by the Government should have been 'excluded from the litigation.' This being so, the equitable matter set up by the plaintiff in its reply presented no issue properly cognizable by the court below, and the decree entered upon such issue is of no legal effect."

Inasmuch, however, as the appellee has not claimed either in the court below nor in this court, that the defense is irrelevant, we have passed upon the merits of the issue presented to us, namely, whether or not the surrender of the subsequent policies for the cash surrender value thereof, precludes the veteran from receiving the payments provided for in the original War Risk Insurance policy in the event that he became totally and permanently disabled during the life of the policy.

Judgment affirmed.

[File endorsement omitted.]

61 In United States Circuit Court of Appeals for the Ninth Circuit

No. 6643

UNITED STATES OF AMERICA, APPELLANT
vs.
CLARENCE P. ARZNER, APPELLEE

Judgment

Filed April 4, 1932

Upon appeal from the District Court of the United States for the Western District of Washington, Northern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Washington, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

[File endorsement omitted.]

62 In United States Circuit Court of Appeals

[File omitted.]

Order staying issuance of mandate

Filed April 15, 1932

Upon application of Mr. Anthony Savage, United States attorney, counsel for the appellant, and good cause therefor appearing, it is ordered that the issuance, under Rule 32, of the mandate of this court in the above cause be, and hereby is, stayed to and including May 31, 1932; and in the event the petition for a writ of certiorari to be made by the appellant herein be docketed in the clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR,
United States Circuit Judge.

Dated: San Francisco, California, April 15, 1932.

[File endorsement omitted.]

63 [Clerk's certificate to foregoing transcript omitted in printing.]

64 Supreme Court of the United States

Order allowing certiorari

Filed October 10, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Indorsement on cover:) File No. 36888. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 191. The United States of America, petitioner, vs. Clarence P. Arzner. Petition for a writ of certiorari and exhibit thereto. Filed July 1, 1932. File No. 36888.

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No. 191

In the Supreme Court of the United States

OCTOBER TERM, 1932

UNITED STATES OF AMERICA, PETITIONER

v.

CLARENCE P. ARZNER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Specification of errors to be urged	5
Reasons for granting the writ	5
Appendix	7

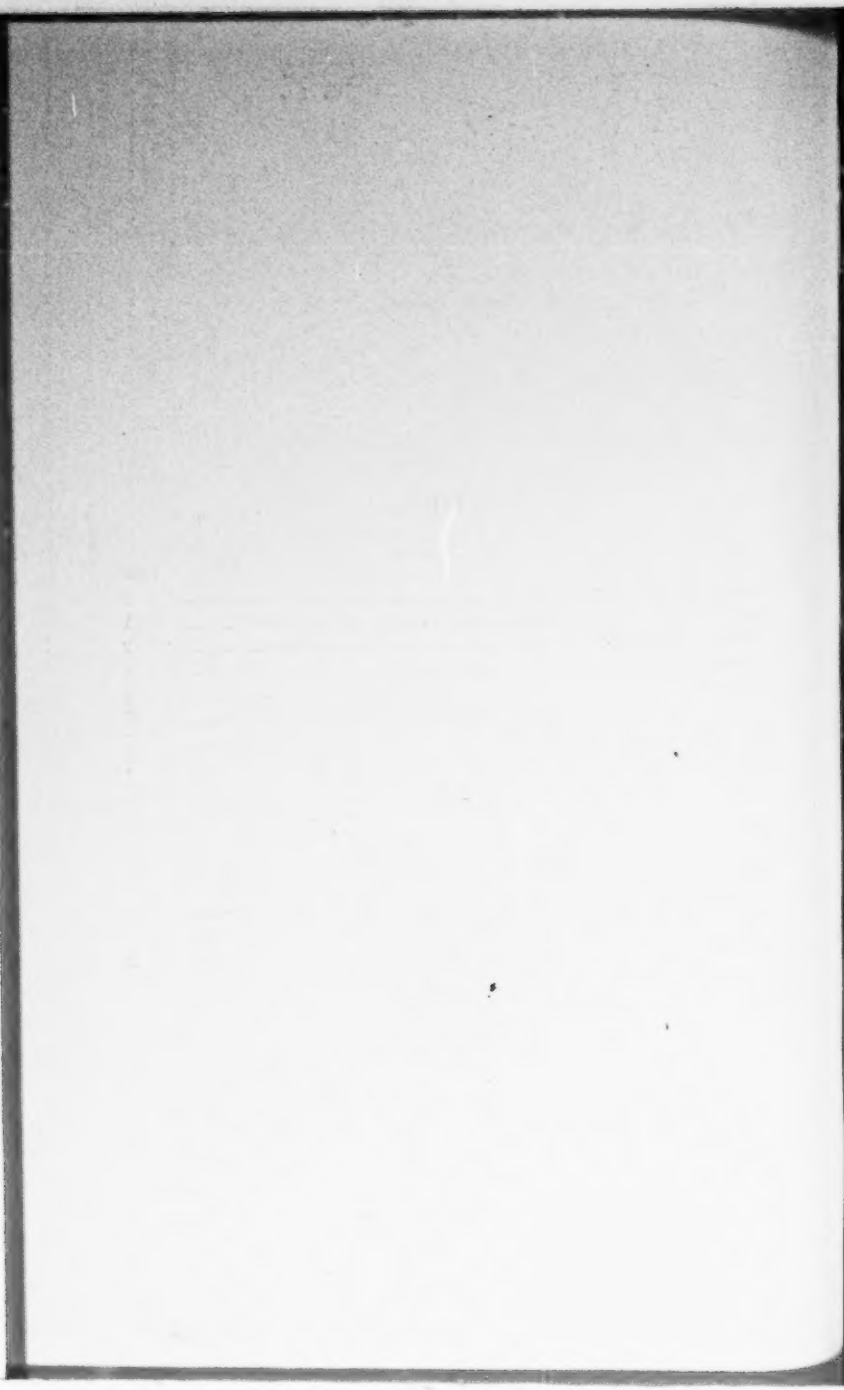
CITATIONS

Cases:

United States v. *Andrews*, 43 F. (2d) 80 5

Statutes:

World War Veterans' Act of 1924, as amended by the Act of July 3, 1930, c. 849, 46 Stat. 991, 1001 (U. S. C. Sup. V., Title 38, Sec. 518) Sec. 307 2



In the Supreme Court of the United States

OCTOBER TERM, 1932

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

CLARENCE P. ARZNER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above case on April 4, 1932 (R. 57), affirming the judgment of the United States District Court for the Western District of Washington.

OPINION BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 53) is reported in 57 F. (2d) 488.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 4, 1932. (R. 57.) The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where the holder of a policy of war risk term insurance, which has lapsed, reinstates and converts his insurance into ordinary life policies and then surrenders these policies upon payment of the cash surrender value, is he entitled, under Section 307 of the World War Veterans' Act of 1924, as amended by the Act of July 3, 1930, to recover upon the original policy for total and permanent disability occurring during the life of such policy, even though unable to surrender the converted policies?

STATUTE INVOLVED

Section 307 of the World War Veterans' Act of 1924, as amended by the Act of July 3, 1930, c. 849, 46 Stat. 991, 1001 (U. S. C. Sup. V, Title 38, Sec. 518) provides:

> All contracts or policies of insurance heretofore or hereafter issued, reinstated, or converted shall be incontestable from the date of issuance, reinstatement, or conversion, except for fraud, nonpayment of premiums, or on the ground that the applicant was not a member of the military or naval forces of the United States, and subject to the provisions of section 23: *Provided,* That the insured under such contract or policy may, without

prejudicing his rights, elect to make claim to the bureau or to bring suit under section 19 of this Act on any prior contract or policy, and if found entitled thereto, shall, upon surrender of any subsequent contract or policy, be entitled to payments under the prior contract or policy: *Provided further,* That this section shall be deemed to be effective as of April 6, 1917, and applicable from that date to all contracts or policies of insurance.

STATEMENT

This is an action against the United States to recover monthly installments alleged to have accrued under the terms of a war risk insurance policy for total and permanent disability occuring during the life of such policy. The essential facts are not in dispute, and, as disclosed by the pleadings and testimony, are as follows:

Respondent enlisted in the Army on or about March 29, 1918, and was discharged on January 16, 1919. (R. 2, 30.) While in the service he applied for and was granted a war risk insurance policy in the sum of $10,000, on which the premiums were paid to and including January, 1919 (R. 2, 30, 33), when the policy lapsed for nonpayment of premiums. On March 1, 1920, this policy was reinstated and converted into an ordinary life policy, upon which ~~petitioner~~ respondent paid the premiums to and including February, 1921. (R. 5–6, 30, 33.) On February 28, 1921, respondent surrendered

$5,000 of this insurance for the cash surrender value, which amounted to $45.20. (R. 6, 30–31, 33.) The remaining $5,000 was surrendered on December 29, 1921, for a cash surrender value of $18.30. (R. 6, 31. 33.)

The case was tried before a jury. (R. 11.) At the close of respondent's evidence, the Government moved for a nonsuit upon the ground, among others not now material, "that the plaintiff having reinstated and converted the entire $10,000 of his war risk insurance on or about March 1, 1920, and in the year 1921 having surrendered the entire converted policy and accepting its cash surrender value, is not in a position to comply with the Statute [Section 307 World War Veterans' Act, as amended by the Act of July 3, 1930, *supra,* p. 2] and, therefore, is precluded from recovering upon his term insurance policy." The District Court overruled this motion, holding that the statute had been sufficiently complied with by the prior surrender of the converted policies for their cash surrender value. (R. 35–36.) The Government excepted to this ruling (R. 36), and at the close of the evidence moved for a directed verdict upon the same ground. (R 37.) This motion being denied, exception was taken (R. 37.)

The case went to the jury upon the sole issue whether the respondent became totally and permanently disabled while his original policy was in

force. (R. 39.) The jury returned a verdict for the respondent, in which they found that "he became totally and permanently disabled on the 29 day of September, 1918." (R. 14.) Judgment was accordingly entered for the respondent for the monthly installments of insurance which remained unpaid as of June 26, 1931, the date of the verdict. (R. 15–17.) Upon appeal by the United States, the Circuit Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court. (R. 52–58.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In holding that respondent was entitled to recover upon his original policy despite his surrender of the converted policies and receipt of cash surrender value therefor.

2. In holding that respondent was entitled to recover upon his original policy even though he was not in a position, as required by Section 307 of the World War Veterans' Act of 1924, as amended July 3, 1930, to surrender his subsequent policies.

3. In affirming judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals for the Ninth Circuit in the instant case is in direct conflict with that of the Circuit Court of Appeals for the Tenth Circuit in *United States* v. *Andrews*,

43 F. (2d) 80. In that case it was held that a veteran was not entitled to recover upon that portion of his insurance which he had reinstated, converted, and later surrendered for the cash surrender value.

2. It is important that this conflict be speedily settled to the end that the proper rule may be applied in future cases. As appears from a tabulation supplied by the Veterans' Administration, printed as an Appendix hereto, there have been 61,912 contracts of war-risk insurance surrendered for the cash surrender value since 1920. The total amount of insurance covered by these contracts is over $185,000,000. At present there are pending on the dockets of the various United States District Courts over 9,000 actions upon war-risk insurance policies, and while there is no way of estimating the number of suits which have already been or will be filed in the future involving the question presented in the instant case, it is reasonable to assume that the number will be substantial.

Wherefore, it is respectfully submitted that the petition should be granted.

THOMAS D. THACHER,
Solicitor General.

JULY, 1932.

APPENDIX

Contracts of War Risk Insurance surrendered for cash surrender value

Year	Amount of insurance	Number of policies
1920	$1, 955, 500. 00	577
1921	16, 082, 422. 30	7, 202
1922	19, 401, 529. 61	8, 822
1923	13, 026, 096. 13	5, 525
1924	12, 289, 946. 50	4, 519
1925	12, 735, 641. 29	4, 253
1926	13, 955, 505. 48	4, 234
1927	15, 007, 623. 24	4, 338
1928	17, 497, 199. 43	4, 818
1929	19, 338, 212. 88	5, 311
1930	20, 361, 446. 74	5, 651
1931	23, 428, 504. 39	6, 662
Total	185, 079, 627. 97	61, 912

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No. 191

In the Supreme Court of the United States

OCTOBER TERM, 1932

UNITED STATES OF AMERICA, PETITIONER

v.

CLARENCE P. ARZNER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Specification of errors	5
Summary of argument	5
Argument:	
I. Preliminary statement	6
II. The respondent was not entitled to recover on his original policy since he did not and could not surrender his converted policy	14
Conclusion	23
Appendix	24

CITATIONS

Cases:	
Anderson v. *United States*, 36 F. (2d) 45	11
Birmingham v. *United States*, 4 F. (2d) 508	21
Blackburn v. *Merchants Life Insurance Co.*, 90 Cal. App. 362	15
Blume v. *Pittsburg Life and Trust Co.*, 263 Ill. 160	16, 23
Brown v. *Gibson*, 107 Va. 383	16
Collman v. *Assurance Society*, 133 Iowa 177	23
Coffey v. *Universal Life Insurance Co.*, 7 Fed. 301	23
Crawford v. *United States*, 40 F. (2d) 199	9, 21
Deane v. *Caldwell*, 127 Mass. 242	15
Duggan v. *United States*, 36 F. (2d) 804	9
Franks v. *United States*, 43 F. (2d) 455	9
Goodhue v. *Hartford Fire Insurance Co.*, 175 Mass. 187	16
Green v. *Insurance Co.*, 112 Kan. 50	15
Herrig v. *United States*, 53 F. (2d) 327	22
Hilliard v. *Wisconsin Life Insurance Co.*, 137 Wis. 208	23
Jordan v. *United States*, 36 F. (2d) 43	8, 11
Knapp v. *Homeopathic Mutual Life Insurance Co.*, 117 U. S. 411	22
Kothe v. *Phoenix Mutual Life Insurance Co.*, 269 Mass. 148	23
Long v. *United States*, 45 F (2d) 590	22

Cases—Continued.

	Page
Matter of Attorney General v. *Continental Life Insurance Co.*, 93 N. Y. 70	23
McCormick v. *The Travelers Insurance Co.*, 215 Mo. App. 258	15
McLaughlin v. *Equitable Life Assurance Society*, 38 Nebr. 725	16, 23
Meadows v. *United States*, 281 U. S. 271	21
Nolander v. *Burns*, 48 Minn. 13	16
Quirk v. *United States*, 45 F. (2d) 631	22
Schumacher v. *Manhattan Life Insurance Co.*, Fed. Cas. No. 12, 490	23
Sheerer v. *Manhattan Life Insurance Co.*, 20 Fed. 886	23
Silva v. *Bair*, 141 Cal. 599	15
Sprencel v. *United States*, 47 F. (2d) 501	22
Stayner v. *Equitable Life Assurance Society*, 22 Misc. Rep. 53	23
Stevens v. *United States*, 29 F. (2d) 904	8
United States v. *Acker*, 35 F. (2d) 646	9
United States v. *Allen*, 33 F. (2d) 888	8
United States v. *Andrews*, 43 F. (2d) 80	9, 21
United States v. *Banks*, 36 F. (2d) 47	10
United States v. *Barker*, 36 F. (2d) 55	8
United States v. *Buzard*, 33 F. (2d) 883	8
United States v. *Cross*, 33 F. (2d) 887	8
United States v. *Crowell*, 48 F. (2d) 475	22
United States v. *Golden*, 34 F. (2d) 367)	9
United States v. *Jensen*, 36 F. (2d) 47	10
United States v. *Kusnierz*, 33 F. (2d) 887	8
United States v. *Loveland*, 25 F. (2d) 447	21
United States v. *Schweppe*, 38 F. (2d) 595	9
United States v. *Stamey*, 48 F. (2d) 150	22
United States v. *Worley*, 281 U. S. 339	20
Universal Life Insurance Co. v. *Devore*, 88 Va. 778	23
Watson v. *United States*, 45 F. (2d) 589	22
Wells v. *Vermont Life Insurance Co.*, 28 Ind. App. 620	16, 23
White v. *United States*, 270 U. S. 175	20
Woolfolk v. *United States*, 44 F. (2d) 701	9

Statutes:

Act of August 9, 1921, c. 57, 42 Stat. 157	8
Act of March 4, 1923, c. 291, 42 Stat. 1527	8
Act of May 29, 1928, c. 875, 45 Stat. 970 (U. S. C. Sup. V, Title 38, Sec. 512 (a)	18
Act of July 3, 1930, c. 849, Sec. 24, 46 Stat. 991, 1001 (U. S. C. Sup. V, Title 38, Sec. 518)	2
War Risk Insurance Act of October 6, 1917, c. 105, 40 Stat. 398, 409, as amended—	
Sec. 400	6
Sec. 404	6
Sec. 411	7

Statutes—Continued. Page
World War Veterans' Act of June 7, 1924, c. 320, 43 Stat. 607, as amended—
Sec. 300 (U. S. C., Title 38, Sec. 511) 6
Sec. 301 (U. S. C., Sup. V, Title 38, Sec. 512) 6
Sec. 304 (U. S. C., Title 38, Sec. 515) 6
Sec. 307 (U. S. C., Title 38, Sec. 518) 8
Sec. 307, as amended by the Act of July 3, 1930, c. 849, 46 Stat. 991, 1001 (U. S. C. Sup. V, Title 38, Sec. 518) 2
Sec. 310 (U. S. C. Sup. V, Title 38, Sec. 512 (a)) 18
Miscellaneous:
Joyce, The Law of Insurance, 2d Ed., Sec. 1634 15
31 Ops. A. G. 534 7
32 Ops. A. G. 379 7
Congressional Record, Vol. 72, 71st Cong., 2d sess 13
Hearings before a subcommittee of the Senate Committee on Finance on H. R. 10381, 71st Cong., 2d Sess., on May 1, 2, and 5, 1930 12, 13
Sen. Rept. No. 1128, 71st Cong., 2d sess 11
Webster's New International Dictionary 15
Williston on Contracts, Secs. 1876–1878 15

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 191

UNITED STATES OF AMERICA, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 53) is reported in 57 F. (2) 488. While the District Court rendered no formal opinion, its views on the question presented stated upon the overruling of the Government's motion for a non-suit, appear at R. 35–36.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 4, 1932. (R. 58.) The petition for certiorari was filed July 1, 1932, and granted October 10, 1932. (R. 59.) The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where the holder of a lapsed policy of war-risk term insurance reinstates and converts his insurance into an ordinary life policy and thereafter surrenders this policy upon payment of its cash surrender value, is he entitled, under Section 307 of the World War Veterans' Act of 1924, as amended by the Act of July 3, 1930, to recover upon the original term policy for total and permanent disability occurring during the life of such policy, even though unable to surrender the converted policy?

STATUTE INVOLVED

Section 307 of the World War Veterans' Act of 1924, as amended by the Act of July 3, 1930, c. 849, 46 Stat. 991, 1001 (U. S. C. Sup. V, Title 38, Sec. 518) provides:

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or policy: *Provided further*, That this section shall be deemed to be effective as of April 6, 1917, and applicable from that date to all contracts or policies of insurance.

STATEMENT

This is an action against the United States to recover the monthly installments alleged to have accrued under the terms of a war-risk insurance policy by reason of total and permanent disability occurring during the life of such policy. The essential facts are not in dispute, and, as disclosed by the pleadings and testimony, are as follows:

Respondent enlisted in the Army on or about March 29, 1918, and was discharged on January 16, 1919. (R. 2, 30.) While in the service he applied for and was granted a war-risk insurance policy in the sum of $10,000, on which the premiums were paid to and including January, 1919 (R. 2, 30, 33), when the policy lapsed for nonpayment of premiums. On March 1, 1920, this policy was reinstated and converted into an ordinary life policy, upon which petitioner paid the premiums to and including February, 1921. (R. 5–6, 30, 33, 37.) On February 28, 1921, respondent surrendered $5,000 of this insurance for its cash surrender value, which amounted to $45.20. (R. 6, 30–31, 32–33.) The remaining $5,000 was surrendered on December 29, 1921, for its cash surrender value of $18.30. (R. 6, 31, 32–33.)

The case was tried before a jury. (R. 11.) At the close of respondent's evidence, the Government moved for a nonsuit upon the ground, among others

not now material, "that the plaintiff having reinstated and converted the entire $10,000 of his war risk insurance on or about March 1, 1920, and in the year 1921 having surrendered the entire converted policy and accepting its cash surrender value, is not in a position to comply with the Statute [Section 307 World War Veterans' Act, as amended by the Act of July 3, 1930, *supra*, p. 2], and, therefore, is precluded from recovering upon his term insurance policy." The District Court overruled this motion. (R. 35–36.) The Government excepted to this ruling (R. 36), and at the close of the evidence moved for a directed verdict upon the same ground. (R. 37.) This motion was denied and an exception taken. (R. 37.)

The case went to the jury upon the sole issue whether the respondent became totally and permanently disabled while his original policy was in force. (R. 39.) The jury returned a verdict for the respondent, in which they found that "he became totally and permanently disabled on the 29 day of September, 1918." (R. 14.) Judgment was accordingly entered for the respondent for the monthly installments of insurance which remained unpaid as of June 26, 1931, the date of the verdict. (R. 15–17.) Upon appeal by the United States, the Circuit Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court. (R. 53–58.)

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred—

1. In holding that respondent was entitled to recover upon his original policy despite the fact that several years prior to filing suit he had surrendered his converted policy for its full surrender value.

2. In holding that respondent was entitled to recover upon his original policy even though he was not in a position, as required by Section 307 of the World War Veterans' Act of 1924, as amended July 3, 1930, to surrender his subsequent converted policy.

3. In affirming the judgment of the District Court.

SUMMARY OF ARGUMENT

This case involves the construction of Section 307 of the World War Veterans' Act, as amended by Section 24 of the Act of July 3, 1930, p. 2, *supra*. The legislative history of Section 24 of the Act of July 3, 1930, and the setting in which it was enacted are set forth in a Preliminary Statement to the Argument, pp. 6–13, *infra*.

Section 307, as amended, entitles a veteran to recover on his original policy of term insurance if he establishes that he became permanently and totally disabled while that policy was in force, but such recovery is expressly conditioned upon the surrender of any subsequent policy issued to him. If a lapsed term policy is reinstated, converted, and thereafter surrendered for its cash surrender value, the former holder thereof in a suit on his original policy is unable

to comply with the requirement of Section 307, as the converted policy was extingusihed by its surrender for its cash value. Section 307 permits the veteran to sue on either his original policy or his subsequent converted policy, but he can not have the benefit of *both* policies. Payment to the respondent of the cash surrender value of his converted policy constituted full performance by the Government and extinguished its obligations. Since the respondent has received performance and benefit of the converted policy he can not recover on his original term policy.

ARGUMENT

I

PRELIMINARY STATEMENT

Section 400 of the War Risk Insurance Act of October 6, 1917, c. 105, 40 Stat. 398, 409, which subsequently became Section 300 of the World War Veterans' Act of June 7, 1924 (U. S. C., Title 38, Sec. 511), provided for the granting to members of the armed forces of insurance "against death or total permanent disability." Section 404 provided that the insurance so granted should be yearly renewable term insurance during the war and thereafter until converted. By Section 301 of the World War Veterans' Act, as amended (U. S. C., Sup. V, Title 38, Sec. 512), it was provided that all term insurance, with exceptions not here material, should not later than July 2, 1927, be converted into various standard forms of insurance. By Section 304 of that Act, as amended

(U. S. C., Title 38, Sec. 515), provision was made for the reinstatement of lapsed term insurance or converted insurance upon the condition, among others, that the applicant during his lifetime "submits proof satisfactory to the director showing that he is not totally and permanently disabled."

At an early date it was ruled by the Attorney General that the statute contemplated "a contract of insurance against something that may happen and not of indemnity for something which has already happened," and that the Veterans' Bureau (now the Veterans' Administration) was unauthorized to grant insurance upon an application made after total and permanent disability had been sustained. 31 Ops. A. G. 534; 32 Ops. A. G. 379. But because of the great difficulties attendant upon the determination of the question whether a particular individual is totally and permanently disabled, many policies were either issued, reinstated, or converted by the Bureau at a time when, as was subsequently determined, the insured was totally and permanently disabled. This situation gave rise to perplexing legal problems upon which much difference of opinion arose in the lower Federal courts.

Usually the questions thus arising were determined by the courts in connection with the so-called incontestability provisions of the statute. The original War Risk Insurance Act contained no provision relating to the incontestability of policies of insurance, but by Section 411, added to the Act by the

amendment of August 9, 1921, c. 57, 42 Stat. 157, it was provided that policies of war risk insurance "shall be incontestable after six months from date of issuance or reinstatement, except for fraud or nonpayment of premiums." This section was amended by the Act of March 4, 1923, c. 291, 42 Stat. 1527, to provide that such policies shall be incontestable "after the insurance has been in force six months from the date of issuance, or reinstatement, except for fraud or nonpayment of premiums." [1] Thus amended Section 411 of the War Risk Insurance Act was reenacted as Section 307 of the World War Veterans' Act of June 7, 1924 (U. S. C., Title 38, Sec. 518).

Cases frequently arose in the Bureau and before the courts where the veteran had allowed his original term insurance to lapse, had thereafter reinstated it, or reinstated and converted it, and subsequently had brought suit, alleging that he became totally and permanently disabled prior to the lapse of his original policy and was entitled to recover thereon. In numerous such cases it was held that the veteran could not recover. *Stevens* v. *United States*, 29 F. (2d) 904 (C. C. A. 8th); *United States* v. *Buzard*, 33 F. (2d) 883 (C. C. A. 9th); *United States* v. *Kusnierz*, 33 F. (2d) 887 (C. C. A. 9th); *United States* v. *Cross*, 33 F. (2d) 887 (C. C. A. 9th); *United States* v. *Allen*, 33 F. (2d) 888 (C. C. A. 9th). See also *United States*

[1] For a discussion of the legislative purpose underlying this amendment, see *Jordan* v. *United States*, 36 F. (2d) 43, 44–45 (C. C. A. 9th).

v. *Barker*, 36 F. (2d) 556 (C. C. A. 9th); *Duggan* v. *United States*, 36 F. (2d) 804 (Minn.); *Franks* v. *United States*, 43 F. (2d) 455 (Ore.). The bases for these decisions were not uniform. In the *Stevens case* the decision was rested upon estoppel by contract, i. e., the parties in executing the reinstated contract having assumed as the basis of their negotiations that the insured was not permanently and totally disabled, they were thereafter estopped to deny that fact. In the *Buzard case* the doctrine relied upon by the court was somewhat similar to that of an accord and satisfaction, where the parties "being in doubt as to their rights and obligations, make a binding adjustment by mutual agreement." In the *Cross case* the court made no distinction between a case where the policy had been reinstated and converted and the case where there was only a conversion. In the *Allen*, *Buzard*, and *Cross cases* the Circuit Court of Appeals for the Ninth Circuit stated that a contrary result might have been reached if the reinstatement had been rescinded for "fraud or mistake."

Other courts in situations substantially the same as those involved in the cases above cited allowed recovery on the original policy. *United States* v. *Golden*, 34 F. (2d) 367 (C. C. A. 10th); *United States* v. *Acker*, 35 F. (2d) 646 (C. C. A. 5th); *United States* v. *Schweppe*, 38 F. (2d) 595 (C. C. A. 8th). See *Woolfolk* v. *United States*, 44 F. (2d) 701, 702 (C. C. A. 9th); cf. *Crawford* v. *United States*, 40 F. (2d) 199 (C. C. A. 2d); *United States* v. *Andrews*, 43 F. (2d)

80 (C. C. A. 10th). Here again the bases of decision were not uniform. In the *Golden case*, which involved only a subsequent conversion of the original term insurance, the court held that the doctrine of estoppel was not applicable because the original contract had been converted as the result of a mutual mistake of fact. The court expressly differentiated between the case where there was both a reinstatement and conversion and the case where there was only a conversion, on the ground that under the statute reinstatement could only be granted upon proof by the veteran that he was not then totally and permanently disabled. In the *Acker case* recovery on the original policy was apparently allowed on the grounds that the statute did not permit or authorize the conversion of term insurance which at the time of application for reinstatement had already matured, that a reinstatement under such circumstances was invalid and therefore had no effect upon the claimant's rights under his original policy.

A closely similar problem arose where the insured sought to recover on the reinstated policy and was met by the defense that he had become totally and permanently disabled prior to the reinstatement. In this situation the Circuit Court of Appeals for the Ninth Circuit, resting its decision on the incontestability provisions of the statute, denied recovery. *United States* v. *Jensen*, and *United States* v. *Banks*, 36 F. (2d) 47. A like conclusion was reached by the same court in cases where the total and permanent

disability had occurred prior to the issuance of the original policy. *Jordan* v. *United States*, 36 F. (2d) 43; *Anderson* v. *United States*, 36 F. (2d) 45.

It was with the authorities in this state that Congress, by the Act of July 3, 1930, c. 849, 46 Stat. 991, 1001, amended Section 307 of the World War Veterans' Act to read as set forth at p. 2, *supra*. With respect to this amendment the report of the Senate Committee on Finance states as follows (Sen. Rept. No. 1128, 71st Cong., 2d Sess.):

> Section 24 amends section 307, which relates to the incontestability of insurance contracts. The purpose is to make all contracts or policies of insurance incontestable from date of issuance, reinstatement, or conversion, for all reasons except fraud, nonpayment of premiums, or that the applicant was not a member of the military or naval forces of the United States. This incontestability would protect contracts where they were not applied for within the time limit required, where the applicant was not in the required state of health, or was permanently and totally disabled prior to the date of application, or for any other reasons except those specifically mentioned in the statute. It is appreciated that this is a broad provision, but it was felt that it was necessary in order to do justice to the veterans, to place this insurance on a parity with commercial insurance companies from a stability standpoint and to overcome decisions of the Comptroller General which practically nullify the section as it now

exists.[2] Further provision is made permitting the insured to elect after a reinstatement or conversion to go back to some prior contract and claim rights thereunder; and if he proves himself entitled to such rights, upon surrender of the latter contract or contracts, to be paid under the prior contract. The purpose is to prohibit the raising of estoppel against the claimant either in or out of the courts because of his reinstatement or conversion of his insurance. Provision is also contained whereby suit may be brought either in the original action, or by alterna-

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[2] In the hearings before a subcommittee of the Senate Committee on Finance, 71st Congress, 2d Session, on H. R. 10381 (a predecessor bill containing the same provision as the one here in question), held on May 1st, 2d, and 5th, 1930, the decision of the Comptroller General referred to in the above report was explained to the subcommittee by the Assistant to the Director as follows (pp. 90–91):

"Mr. ROBERTS. Mr Chairman, the present World War veterans' act of 1924, as amended, contains a provision to the effect that where a policy is maintained in force for a period of six months, it should be incontestable, except for fraud or nonpayment of premiums. We have followed that, and in all cases where the policy has remained in force for six months we have paid the claim, irrespective of the merits of it, unless there was fraud or failure to pay premiums. The only cases that have been excepted from that section of the act were where the man originally did not have the right to apply for the insurance, such as a man who was not in the military service, who erroneously made an application, and through an error it was accepted. However, under date of January 16, 1930, notwithstanding the long practice of the bureau, the Comptroller General, in the case of Mabry W. Woodall, held that if a man was permanently and totally disabled at the time he applied for reinstatement of insurance, or conversion of insurance, no matter if he paid the premiums

tive plea in the same suit with a subsequent contract or policy. Recovery, however, can only be effected upon one of the contracts or policies. The effect of the present practice of the bureau in raising estoppel is to penalize the man who pays his premiums or tries to continue all or a part of his insurance in force. This amendment is specifically made retroactive in order that in any case where the claim has been heretofore disallowed on the ground of estoppel, or because of the policy not being incontestable, the insured, or the beneficiary under such contract or policy may,

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for 10 or 15 years, if the bureau was to administratively then determine that 10 years before he had been permanently and totally disabled at the time he applied, the policy was not incontestable, the statute did not protect it, and the man would have no rights, or his beneficiary would have no rights, whichever was the case.

"This was, of course, an overturning of a practice not only in the bureau, but a practice which obtains with all commercial insurance companies. The very purpose of an incontestable clause is to give some stability to the policies, and while the amendment was not recommended by the bureau, we felt the weight and force of the argument in favor of it.

"The report of the House committee, which accompanied the amendment, stated that it was to protect all policies except in the one class of cases where the veteran was not originally entitled to apply. It is a very drastic provision, more drastic than any commercial contract, because they usually require the payment of premiums for a period of one or two years. The present statute requires it for six months. This amendment, if adopted, would make it incontestable from the moment of acceptance by the bureau, except for fraud or failure to pay premiums."

See also Congressional Record, Vol. 72, pp. 7078, 7082, 7670, 11308, 11465, 11499.

> if he/she so elects, have the benefit thereof. It is contemplated that payments in cases of contracts or policies incontestable under this section will begin from date of maturity of such contracts or policies.

II

THE RESPONDENT WAS NOT ENTITLED TO RECOVER ON HIS ORIGINAL POLICY SINCE HE DID NOT AND COULD NOT SURRENDER HIS CONVERTED POLICY

Section 307 of the World War Veterans' Act, as amended by the Act of July 3, 1930, p. 2, *supra*, provides that:

> All contracts or policies of insurance heretofore or hereafter issued, reinstated, or converted shall be incontestable from the date of issuance, reinstatement, or conversion, * * *

except for matters not here material. That section further provides that the holder of any Government insurance policy—

> may, without prejudicing his rights, elect to make claim to the bureau or to bring suit under section 19 of this Act on any prior contract or policy, and if found entitled thereto, shall, *upon surrender of any subsequent contract or policy*, be entitled to payments under the prior contract or policy. (Italics ours.)

The obvious purpose of Section 307, as amended, was to permit an insured, such as the respondent, to sue at his option on either his original term insurance policy or on his converted policy. But if he elects to sue upon his prior term policy, the right to recover is expressly made conditional upon the surrender of

the subsequent converted policy. In the case at bar the respondent, eight years prior to filing suit, had voluntarily returned his converted policy to the Veterans' Bureau and had received in lieu thereof its full cash surrender value. The effect of this action was to extinguish the converted policy and to terminate all rights and obligations of both the insured and the Government under that policy. Joyce, The Law of Insurance, 2d Ed., Sec. 1634; Williston on Contracts, Secs. 1876–1878. See also *Green* v. *Insurance Co.*, 112 Kan. 50; *McCormick* v. *The Travelers Insurance Co.*, 215 Mo. App. 258; *Blackburn* v. *Merchants Life Insurance Co.*, 90 Cal. App. 362. Cf. *Deane* v. *Caldwell*, 127 Mass. 242, 248; *Silva* v. *Bair*, 141 Cal. 599, 603. Accordingly, the respondent was unable at the time of the recovery of judgment in the District Court to comply with the express requirement of the statute by surrendering the converted contract, and, therefore, he was not entitled to recover.

The Circuit Court of Appeals, conceding that "the statute requires a surrender of the subsequent contract as a condition precedent * * * to receiving the payments" under the prior policy, held that if the insured "has already surrendered the [prior] policy there is no occasion to surrender it after the judgment," adding, "nor is it possible to do so." (R. 55.) This conclusion, we submit, does unwarranted violence to the language of the statute and misconceives the essential purpose of the statutory condition.

The word "surrender" means to yield, render, or deliver up. Webster's New International Diction-

ary. See also *Nolander* v. *Burns*, 48 Minn., 13; *Wells* v. *Vermont Life Insurance Co.*, 28 Ind. App. 620. It presupposes, especially when preceded by the word "upon," the possession or ownership of the thing to be surrendered. *Brown* v. *Gibson*, 107 Va. 383, 387. As applied to ordinary insurance it connotes the yielding up of the contract between the parties and the delivery to the insurance company of the policy itself which embodies the contract of insurance. *Goodhue* v. *Hartford Fire Insurance Co.*, 175 Mass. 187, 189; *Blume* v. *Pittsburg Life and Trust Co.*, 263 Ill. 160; *McLaughlin* v. *Equitable Life Assurance Society*, 38 Nebr. 725, 734; *Wells* v. *Vermont Life Insurance Co.*, 28 Ind. App. 620, 623. When judgment was entered in the case at bar the insured had no contract with the Government and did not own or possess the policy of which the statute required surrender as a condition precedent to recovery. We do not think the language of the statute may be satisfied by the fact that several years prior to the suit the respondent had surrendered his converted policy, not for the purpose of claiming rights under his earlier policy, but for the purpose of receiving the benefits of the converted policy.

A more serious error of the court below was its failure, we believe, to give effect to the underlying purpose of the statutory provision. The provision that recovery upon a prior policy should be had only upon surrender of a subsequent policy was not merely a technical, procedural requirement which had as its object the elimination of any possible future claims

upon the later policy. It was the expression of an intention, dictated by obvious reasons of fairness and equality, *that the insured should not have the benefit of both policies.* This purpose is not only apparent from the language of the statute but is unmistakably indicated by the statement in the committee report (p. 13, *supra*) that "Recovery * * * can only be effected upon one of the contracts or policies." The effect of the decision of the courts below is to allow the respondent the benefit of both his original term policy and his subsequent converted policy.[3]

By the converted policy of insurance issued to the respondent the United States undertook to pay to him in the event of his becoming totally and permanently disabled while the policy was in force certain specified monthly payments over a stated period. In the event of his death, while the policy was in force and without his having become totally and permanently disabled, the Government undertook to pay specified amounts of money over a stated period to the beneficiary named in the policy. The Government also covenanted as follows:[4]

> Upon written request therefor by the insured made while this policy is in force

[3] It should be noted that the court below did not remit from the amount of the judgment the amounts paid to the respondent as the cash surrender value of the converted policy. The court thus construes Section 307, as amended, not only to permit recovery upon the original policy but to require the Government to return to the veteran the cash surrender value of the converted policy.

[4] See the respondent's brief in opposition to the petition for certiorari, p. 8. See also the Appendix, *infra*.

> or not later than three calendar months after the due date of the premium in default and *upon complete surrender of this policy with all claims thereunder*, the United States will pay to the insured the cash-surrender value hereof. (Italics ours.)

By making payment in full pursuant to any one of these covenants the Government fully performed its contract. If the respondent became totally and permanently disabled and the Government paid him the stated amounts during the requisite period, the contract was at an end; it no longer operated as a contract of insurance against the *death* of the respondent. Likewise by the "complete surrender" of the policy and "all claims thereunder" in return for the cash surrender value, the obligations of the Government were completely extinguished. Thereby the contract was fully performed as to both parties, and the respondent, having voluntarily elected to accept one of the alternative settlements prescribed by the policy, must be regarded as having received in full the benefits thereof.

Any doubt that, by reason of the surrender of the converted policy for its cash surrender value, the respondent must be held to have received full satisfaction of the Government's insurance undertaking with respect to him is removed by the statute itself. By Section 310 of the World War Veterans' Act, as added to the statute by the Act of May 29, 1928, c. 875, 45 Stat. 970 (U. S. C. Sup. V, Title 38, Sec. 512 (a)), Congress provided that upon application

and upon satisfactory evidence of good health the United States should grant converted insurance "to any person who has heretofore applied or been eligible to apply for yearly renewable term insurance or United States Government life (converted) insurance," with the proviso—

> That no person who has surrendered his United States Government life (converted) insurance for its cash surrender value shall be entitled to apply for insurance under this section to the extent of the amount of the insurance so surrendered.

The significance of this proviso is apparent. It is common knowledge that great numbers of veterans allowed their Government insurance to lapse upon leaving the service. For a considerable period, by repeated extensions of the expiration date, Congress made it possible for such veterans to secure the reinstatement of their insurance upon proof satisfactory to the Director that the applicant was not totally and permanently disabled. (U. S. C., Title 38, Sec. 515.) Finally, by the Act of May 29, 1928, *supra*, Congress made it possible for any person who had ever been eligible for Government insurance, no matter how often he had allowed his insurance to lapse, to secure such insurance upon proof to the Veterans' Bureau of good health. If a veteran has allowed his original insurance to lapse, then has reinstated and converted it, then has allowed his converted insurance to lapse, still, under the provision above quoted, he can secure Government insurance.

The one person otherwise eligible who can not even to-day reinstate his Government insurance *is the one who has surrendered his converted insurance for its cash surrender value.* Congress has thus unmistakably indicated its view that to such a one as the respondent its obligations with respect to insurance are wholly at an end. Accordingly, since the respondent has received the full benefit of his converted insurance, he is precluded from recovery on his original policy.

The court below rested its decision largely upon the ground that the respondent came "within the spirit of the remedial legislation of July 3, 1930," that recovery by the respondent was "in the interest of justice" since under the facts found by the jury "the insured has been paying the government, where, * * * the government should have been paying him." (R. 55.) We submit that such considerations are irrelevant in view of the plain language of the statute. Essentially, we believe, they represent an application of the doctrine of strict construction which ordinarily applies to insurers but which for obvious reasons is not applicable to the Government.

This Court has made it clear that Government war risk insurance is largely a matter of benevolence, that it was entered into at considerable cost to the Government, and that payments under Government insurance policies "include both insurance and pension." *United States* v. *Worley*, 281 U. S. 339, 343; *White* v. *United States*, 270 U. S. 175, 180. Not only is the insurance itself largely a gratuity but

the right to reinstate such insurance when lapsed, of which right the respondent availed himself, is wholly a gratuity. *Meadows* v. *United States*, 281 U. S. 271, 274. And, finally, the very right of the respondent to bring suit in the instant case is founded upon a gratuity. The statute upon which the suit is predicated was enacted upon the assumption that the rights of veterans such as the respondent upon their original term policies had been extinguished by the subsequent reinstatement and conversion of the insurance (p. 12, *supra*.) Under these circumstances the applicable doctrine is not that of strict construction against an insurer, but rather that of the strict limitation of the benefits of a public gratuity to those who can clearly meet the statutory requirements. See *Crawford* v. *United States*, 40 F. (2d) 199, 200 (C. C. A. 2d); *United States* v. *Loveland*, 25 F. (2d) 447 (C. C. A. 3d); *Birmingham* v. *United States*, 4 F. (2d) 508, 509 (C. C. A. 8th).

The precise point involved in the case at bar was considered in *United States* v. *Andrews*, 43 F. (2d) 80 (C. C. A. 10th). There under facts identical with those in the case at bar the court denied the insured the right to recover on his original policy (p. 82)—

> on the ground he cannot now surrender the converted policy since he has enjoyed the benefits of the insurance under it, and it stands as a contract fully performed and executed by the government.

The decision in the *Andrews case* has since been approved by the same court in *Watson* v. *United States*, 45 F. (2d) 589. See also *United States* v. *Crowell*, 48 F. (2d) 475 (C. C. A. 8th); *Quirk* v. *United States*, 45 F. (2d) 631, 639 (W. D. Pa.). The Government, of course, does not question the right of a veteran who has converted his term insurance to sue on his prior policy, even if he has allowed the converted policy to lapse, provided he surrenders the converted policy. *Long* v. *United States*, 45 F. (2d) 590 (C. C. A. 10th); *Sprencel* v. *United States*, 47 F. (2d) 501 (C. C. A. 5th); *Herrig* v. *United States*, 53 F. (2d) 327 (C. C. A. 9th); *United States* v. *Stamey*, 48 F. (2d) 150 (C. C. A. 9th).

While there are no cases involving ordinary life-insurance policies which are precisely in point, a question similar to that here involved has frequently arisen in connection with ordinary life-insurance policies. Covenants similar to those in the respondent's converted policy are not unusual in such policies, and provisions that upon the lapse thereof and *upon the surrender of the policy within a specified time* the company will either pay to the insured the cash-surrender value of the policy or issue a paid-up policy of insurance are not uncommon. In construing such provisions it is held by the great weight of authority, in spite of the doctrine of strict construction, that the delivery or surrender to the company of the policy, strictly in accordance with its terms, is a condition precedent to performance by the insurance company. *Knapp* v. *Homeopathic Mutual Life Insurance Co.*,

117 U. S. 411; *Kothe* v. *Phoenix Mutual Life Insurance Co.*, 269 Mass. 148; *Blume* v. *Pittsburg Life & Trust Co.*, 263 Ill. 160, *supra; McLaughlin* v. *Equitable Life Assurance Society*, 38 Nebr. 725, *supra; Wells* v. *Vermont Life Insurance Co.*, 28 Ind. App. 620, 623, *supra; Collman* v. *Assurance Society*, 133 Iowa 177; *Matter of Attorney General* v. *Continental Life Insurance Co.*, 93 N. Y. 70; *Hilliard* v. *Wisconsin Life Insurance Co.*, 137 Wis. 208; *Universal Life Insurance Co.* v. *Devore*, 88 Va. 778; *Stayner* v. *Equitable Life Assurance Society*, 22 Misc. Rep. 53; *Schumacher* v. *Manhattan Life Insurance Co.*, Fed. Cas. No. 12490 (E. D. Mo.); *Coffey* v. *Universal Life Insurance Co.*, 7 Fed. 301, 307 (Wis.); *Sheerer* v. *Manhattan Life Insurance Co.*, 20 Fed. 886, 889 (Ky.).

CONCLUSION

The decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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NOVEMBER, 1932.

APPENDIX

The Regulations and Rules of Procedure of the Veterans' Administration, issued pursuant to Section 301 of the World War Veterans' Act, as amended (U. S. C., Sup. V, Title 38, Sec. 512), provide in part as follows:

PLANS OF UNITED STATES GOVERNMENT LIFE INSURANCE

3025. *Ordinary Life Policy.*—The ordinary life policy provides the maximum amount of protection for the minimum premium, which is payable so long as the insured may live, or until he becomes totally and permanently disabled.

FORMS OF POLICIES

3040. The forms of policies of insurance described and designated below, bearing the signature of and now on file in the office of the Administrator of Veterans' Affairs, are hereby prescribed for use in granting United States Government life insurance applied for in accordance with the provisions of the World War veterans' act and amendments thereto. Contracts of insurance are hereby authorized to be made in accordance with the terms and conditions set forth in the forms of policies described and designated below:

Ordinary life policy (Form 741)

* * * * *

Treasury Department Form 741 of the Veterans' Administration, being the Government life insurance

ordinary life policy form, contains the following covenants and conditions, among others:

1. * * *.

* * * * *

If any premium be not paid when due, this policy shall cease and become void except as hereinafter provided.

* * * * *

3. This policy, if it has not been surrendered for a cash-surrender value, may be reinstated at any time after lapse upon evidence of the insurability of the Insured satisfactory to the Bureau of War Risk Insurance, and upon the payment of all premiums in arrears, with interest from their several due dates at the rate of five per centum per annum, and the payment or reinstatement of any indebtedness which existed at the time of such default, with policy loan interest. * * *.

* * * * *

5. Cash-surrender value, paid-up insurance, extended insurance, and policy-loan provisions as follows shall be effective only after premiums for twelve full months have been paid—all values, reserves, and net single premiums being based on the American Experience Table of Mortality, with interest at three and one-half per centum per annum:

(*a*) Upon written request therefor by the Insured made while this policy is in force or not later than three calendar months after the due date of the premium in default, and upon complete surrender of this policy with all claims thereunder, the United States will pay to the Insured the cash-surrender value hereof. The said cash-surrender value at the end of any policy year for which premiums have been paid in full, if no installments on account of total permanent disability have been paid, shall be the reserve, together with

any dividend accumulations left on deposit, less any indebtedness under this policy. For each month within any policy year, for which month the premium has been paid, the reserve at the end of the preceding policy year shall be increased by one-twelfth of the increase in reserve for the current policy year.

(*b*) If the policy has not been surrendered for a cash-surrender value, upon default in payment of premium and upon written request of the Insured and complete surrender of this policy with all claims thereunder within three calendar months after the due date of the premium, the Bureau of War Risk Insurance will issue paid-up insurance for such amount, payable in one sum at death, as the then cash-surrender value will purchase when applied as a net single premium at the attained age of the Insured. * * *.

(*c*) Upon default in payment of premium and the expiration of the grace period, if the policy has not been surrendered for a cash value or for paid-up insurance, this policy shall be extended automatically as Term Insurance payable in monthly installments for such time from the due date of the premium unpaid as the cash-surrender value will purchase when applied as a net single premium at the attained age of the Insured. * * *.

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 191

UNITED STATES OF AMERICA, PETITIONER,

v.

CLARENCE P. ARZNER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF CLARENCE P. ARZNER.

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INDEX.

Subject Index.

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	2
Summary of argument	6
Argument	6
The injustice sought to be remedied	6
The direct expression of legislative intent	10
The general rules of construction applicable	13
The justice of the cause	17
Conclusion	33

Citations.

Cases:

Glazgow v. United States, 50 Fed. (2) 178	15
Long v. United States, 45 Fed. (2) 590	19, 23
McNally v. United States, 52 Fed. (2) 440	15
United States v. Andrews, 43 Fed. (2) 80	5, 6, 19, 20, 25, 26
United States v. Arzner, 57 Fed. (2) 488	1
United States v. Cox, 24 Fed. (2) 944	14
United States v. LePage, 59 Fed. (2) 165	16
United States v. Phillips, 44 Fed. (2) 689	15
United States v. Schweppe, 38 Fed. (2) 595	8
United States v. Worley, 281 U. S. 239	13
Watson v. United States, 45 Fed. (2) 589	19, 23
White v. United States, 270 U. S. 175	13, 14

Statutes:

Section 307, U. S. C. A., Title 38	2, 4, 6, 8, 9
Section 512, U. S. C. A., Title 38	18
Section 310, U. S. C. A., Title 38	29

Miscellaneous:

Senate Report No. 1128, 71st Congress	7
Hearing Sub-committee on Senate Committee on Finance, on House Report No. No. 10381, pages 90-91	12

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 191

UNITED STATES OF AMERICA, PETITIONER,

v.

CLARENCE P. ARZNER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF CLARENCE P. ARZNER.

Opinion Below.

Opinion of the Ninth Circuit Court of Appeals (R. 53) is reported in 57 Fed. (2d) 488. There was no opinion in the District Court. The proceeding on the part of the respondent has been throughout in *forma pauperis.*

Jurisdiction.

Petition for writ of certiorari was granted October 10, 1932.

Question Presented.

The question stated in the Government's brief might be more properly restated as follows:

Where the holder of a lapsed policy of war risk insurance reinstates and converts his insurance into an ordinary life policy, and then surrenders this policy, *accepting its* cash surrender value, which accrued by reason of his payments upon such converted policy, is he entitled under Section 307 of the World War Veterans' Act of 1924, as amended by the Act of July 3, 1930, *upon a finding of a jury that he was totally and permanently disabled during the period of his war risk term insurance*, to recover upon such original policy for the total and permanent disability occurring during the life thereof, *although he is unable at such time to surrender his converted policy by reason of its prior surrender?*

Statute Involved.

The particular statute involved is correctly stated in the Government's brief.

Statement.

The Government concedes, as a result of the jury's finding, that Arzner was totally and permanently disabled during the period of his original war risk contract.

Clarence P. Arzner, respondent herein, enlisted in the United States Army on the 29th day of March, 1918, as a member of the 316th Engineers. On September 29, 1918, while operating in the Argonne Sector, he was the victim of shell-shock by explosion of a high-explosive shell, which shock from that time continued as a psychoneurosis neurasthenia with hysterical manifestations, of such a severe character as to prevent his following any substantially gainful occupation.

On June 25, 1918, shortly after enlisting, respondent applied for and was granted war risk term insurance in the amount of $10,000, "payable in monthly installments of $47.50 in the event of his * * * permanent and total disability" during the term thereof.

Arzner's total and permanent disability dates from September 29, 1918. Such was the verdict of the jury, and is admitted by the Government by predicating no error upon the finding of the jury.

The last payment on the term contract was the payment made January 1, 1919, and the policy of term insurance was in full force and effect and the Government's obligation thereunder accrued on the date on which the respondent became permanently and totally disabled.

On March 1, 1920, the respondent, at the behest of the Government agents, signed an application for reinstatement of his $10,000 of insurance, and an application for conversion of the reinstated insurance into an ordinary life policy. At that time he was a patient and ward of the Government by reason of his physical condition. Thereafter the respondent paid the premiums on the converted insurance.

On February 28, 1921, finding himself unable, because of his physical condition, to keep up the payment of premiums, he surrendered $5,000 of the converted insurance, receiving $45.20 as the unearned or cash surrender value thereof. Later, in 1921, for the same reason, he surrendered the other $5,000 of converted insurance, and received for it a total of $18.30 as the unearned or cash surrender value thereof.

Pursuant to the provision of Section 307 of the World War Veterans' Act, as retroactively amended July 3, 1930, this action was instituted. Because of the respondent's physical disability and resultant poverty, he was forced to file and prosecute the action in *forma pauperis.*

Upon trial, the Government contended, on a motion for non suit, that, by reason of the surrender of the converted policies and the acceptance of the unearned or cash surrender value thereof, the respondent was estopped to recover upon the original war risk insurance policy, it being claimed that since Section 307 of the World War Veterans' Act provides for surrender of the policy as a condition precedent to ultimate recovery, the respondent was not in a position to surrender the converted contract for the reason that he had theretofore made a surrender thereof, and that from such surrender an acquittance had resulted, and an estoppel to avail himself of the remedial and retroactive provisions of Section 307, *supra,* follows.

At the time of trial the case of *United States* v. *Andrews,* 43 Fed. (2) 80, was urged as controlling. The trial court was unimpressed by contention of

counsel for the Government, or the case of *United States* v. *Andrews, supra,* and stated:

> "There not being any decision in this Circuit on the question here to be decided, the decision of the Tenth Circuit does not bind the court in the trial of this case.
>
> "I feel that I ought to decide the proposition as it appears to have been decided in my district from which the appeal was taken, and I cannot decide it otherwise.
>
> "I am not compelled to follow the Circuit Court of the Tenth Circuit. I think Judge Cotteral's idea of this statute is correct. I cannot see beyond any question why this boy should now return this policy, having once returned it to comply with the statute. It is true he cancelled it, and it is no longer in effect. He has already surrendered it. There is no use for this court to demand his doing something which he has already done."

The same argument was again presented by the Government upon a motion for a directed verdict, and this motion was likewise denied and judgment was entered upon the verdict of the jury for the respondent.

The Government appealed. The decision upon appeal, 57 Fed. (2) 488, written by Judge Wilbur, is concurred in by Judges Sawtelle and St. Sure. The court fully considered *United States* v. *Andrews, supra,* and stated:

> "We are unable to agree to the conclusion reached by the United States Circuit Court of Appeals, Tenth Circuit."

The judgment of the trial court was affirmed.

Summary of Argument.

Section 307 of the World War Veterans' Act as amended by Section 24 of the Act of July 3, 1930, was designed to permit the recovery by an insured of those rights which had accrued under an original policy of war risk term insurance, regardless of lapse, reinstatement, conversion or surrender of a subsequent converted policy. This conclusion is in accord with:

(1) The injustice sought to be remedied;

(2) The direct expression of legislative intent;

(3) The general rules of construction applied to Government insurance; and,

(4) The justice of the cause.

ARGUMENT.

The Injustice Sought to Be Remedied.

As indicated by the numerous citations in the Government's brief, prior to the enactment of Section 307 of the World War Veterans' Act, as amended by Section 24 of the Act of July 3, 1930, numerous cases had been prosecuted in the Federal Courts for the purpose of recovering because of total and permanent disability, prior to the lapse of an original policy of war risk term insurance and after converted insurance had issued.

The basis, as stated in the Government's brief, for these decisions was not uniform. In some cases recovery was allowed, and in those in which recovery was not allowed, the courts considered such subjects as estoppel, accord and satisfaction, novation, fraud

and mistake (petitioner's brief, pp. 8-9). It was with this situation that the Congress gave consideration to the subject.

Men had paid for a policy of insurance and while it was in full force and effect had suffered the required degree of disability, and were entitled to recover insurance indemnities. By subsequent events of various kinds, veterans unacquainted with their rights, some too far disabled to protect themselves, were, by mounting technicalities, being farther and farther removed from their right to recover insurance for those disabilities which they had incurred. Estoppel from various causes, none having to do with the merits of the veteran's disability, were being asserted in various courts. The situation presented a reasonable one for the interference and expression of Congress.

The petitioner cites at pages 11-14 of its brief the report of the Senate Committee on Finance, Senate Report No. 1128, Seventy-first Congress, Second Session, as giving some key to the legislative intent. Upon the subject here under discussion, the only phrase applicable is:

> "Further provision is made permitting the insured to elect, after a reinstatement or conversion, to go back to some prior contract and claim rights thereunder; and if he proves himself entitled to such rights, upon surrender of the latter contract or contracts, to be paid under the prior contract. *The purpose is to prohibit the raising of estoppel against the claimant either in or out of the court because of his reinstatement or conversion of his insurance.*"

In other words, the Congress was in effect saying that the Government did not desire to take advantage of one who had in fact incurred total and permanent disability and had thereafter, through mistake, inadvertence, fraud, or overreaching on the part of the Government's agents, novation or any other cause, been placed in a position where the Government could urge a reinstatement or conversion as an estoppel to prevent the recovery of a just obligation.

The right to recover upon an original war risk term contract being determined by the verdict of a jury, the converted policy and all transactions under it of necessity fall into the realm of mutual mistake, and to correct this situation, the Congress enacted, in the Act of July 3, 1930, its appropriate amendment to Section 307 of the World War Veterans' Act.

The language of Justice Kenyon in *United States* v. *Schweppe*, 38 Fed. (2d) 595, written prior to the enactment of Section 307 above referred to, is nevertheless apt, as illustrating the situation which prompted the Congress to a legislative declaration.

> "In the light of the verdict of the jury, it is apparent that the proceedings subsequent to July 1, 1919, were the result of a mutual mistake on the part of the Government and the appellee. There was no insurance to be reinstated and none to be converted. It seems to us that it would work a serious injustice to hold that, where there was a mutual mistake on the part of the Government and the appellee, such mistake should be permitted to operate as an estoppel as to one of the parties, and prevent him recovering for his total and permanent disabil-

> ity. Some courts have held that war risk insurance contracts and the law under which they were issued should be construed liberally in favor of the soldier. *United States* v. *Cox* (C. C. A.) 24 F. (2) 944; *United States* v. *Eliasson* (C. C. A.) 20 F. (2) 821. The Government has pursued a liberal policy towards the soldiers who willingly offered their lives to the Government in its hour of trial, and the doctrine of estoppel under the circumstances here presented ought not to be applied. We think the trial court was correct in holding there was no estoppel."

Viewed from the standpoint of the old law, the mischief and the remedy, there should be no other legislative intent indulged in than that the Congress sought to allow to disabled veterans the right of recovery, f[illegible]otherwise, under the interpretation sought by the Government, the veteran would be entitled to the verdict of a jury and after both the veteran and the Government has been put to the expense of trial, for technical reasons in no way affecting the merits of the controversy, the veteran would be deprived of that for which he had paid and which the jury determined he should receive.

The proviso in Section 307, "upon surrender of any subsequent contract or policy," can only, if the injustice imposed by the plea of estoppel is to be remedied, be considered as a safety provision to prevent their continuing as outstanding, policies which because of the veterans' condition as being totally and permanently disabled and so entitled to his rights, are of

no legal standing, and should not therefore be suffered to remain current. A surrender of the policy, therefore, whether made before or after the finding of the jury, must satisfy the statute if recovery of insurance is the thing sought to be permitted and the injustice to which the act is directed is to be remedied.

2.

The Direct Expression of Legislative Intent.

The statement contained in the report of the Senate Committee on Finance, page 6, *supra*, is a direct expression bearing on legislative intent; a statement on the part of Congress that its purpose is to prohibit the raising of estoppel against the claimant either in or out of court, because of his reinstatement or conversion of insurance. It is followed by this:

> "Provision is also contained whereby suit may be brought either in the original action or by alternative plea, in the same suit, with a subsequent policy. Recovery, however, can only be effected upon one of the contracts or policies. The effect of the present practice of the Bureau in raising estoppel is to penalize the man who pays his premiums or tries to continue all or part of his insurance in force. This amendment is specifically made retroactive in order that any cases where the claim has been heretofore disallowed on the ground of estoppel * * * the insured under such contract or policy may if he/she so elects have the benefits thereof."

This is a definite expression of a liberal intent and an invitation to liberal construction for the purpose

of accomplishing the justice sought to be accomplished.

The judgment in this instance constitutes the veteran's first and only recovery of insurance. In the Senate Report it is said:

> "Recovery, however, can only be effected upon one of the contracts or policies."

This contemplates a recovery by suit brought upon the policy as is clearly indicated by the preceding sentence, and we submit that the surrender of a converted policy through inability to pay the premiums accruing thereon, and the receipt back of the unearned premium is not a recovery in any sense in which the Congress was using that word. What they sought to allow was one judicial determination and award of insurance accrued, and what they sought to avoid was a second recovery of insurance indemnity.

No injustice results to the Government from this interpretation, for whether there be a surrender of a converted policy, and a return to the veteran of the unearned premium thereon, or a lapse of such a policy by its absorption in continuing insurance, the Government is out nothing. The veteran is the loser by reason of having paid for that which had theretofore accrued.

It would be a folly of interpretation to reverse this cause, and say that the Congress intended that in the one instance the veteran should recover his war risk insurance because, even though his converted policy has long since lapsed and the unearned insurance value thereof has been eaten up in extended insurance, the

veteran has a piece of paper in his hands which he can surrender, while in the other instance, the veteran should not recover insurance because a mistaken contract has been mutually rescinded, and unearned premiums returned. Such is the illogical result of the several opinions of the Tenth Circuit Court of Appeals, reviewed later herein, and which the Circuit Court of Appeals for the Ninth Circuit refused to follow.

Counsel for the petitioner quoted from the hearing before the sub-committee of the Senate Committee on Finance, Seventy-first Congress, Second Session, on House Resolution No. 10381 (a predecessor bill), pages 90 and 91 (Petitioner's brief, p. 13), as evidencing the legislative intent and spirit of the Congress. The reference to the report of the House Committee is interesting:

> "The report of the House Committee which accompanies the amendment states that it was to protect all policies except the one class of cases where the veteran was not originally entitled to apply. *It is a very drastic provision, more drastic than any commercial contract,* because they usually require the payment of premiums for a period of one or two years."

This certainly evidences an expression on the part of the House Committee that it is its intention and desire, and consequently the intention and desire of the Government, that its veterans should receive the benefit of a law more drastic in its provisions than the stipulations of any commercial contract. It is evidence of a desire on the part of the Government that its

law and its contract should receive a fair degree of liberality in construction and interpretation to the end that veterans should receive that insurance for which they have paid.

From the language of the act itself, which we have under consideration, it is the evident intention that technical defenses should be avoided; that the veteran, if entitled thereto, should be allowed one *recovery of insurance.*

This right is lost if the Government's contention prevails in this case, for, while they concede to the veteran that, being totally and permanently disabled he is entitled to recover had he done thus and so, they would deprive him of the right of recovery because he did not do so and thus. We submit that such an interpretation would violate the evident and expressed intent of the Congress.

3.

The General Rules of Construction Applied to Government Insurance.

The petitioner states that the lower court rested its decision largely upon the ground that the respondent came "within the spirit of the remedial legislation of July 3, 1930." This, they argue, is an erroneous application of a doctrine of liberal construction in favor of the veteran, and cite the cases of *United States* v. *Worley,* 281 U. S. 239, and *White* v. *United States,* 270 U. S. 175, in support of a contention that the doctrine applicable to this case is not a doctrine of liberal construction in favor of the veteran, but rather a so-

called doctrine of strict limitation of benefits of a public gratuity.

It is to be noted, *first*, that the lower court rested its decision upon a determination that the insured in the instant case came under the letter of the Act of July 3, 1930, as well as the spirit of the act. Upon page 490 of the decision reported in 57 Fed. (2), 488, the court says:

> "We think the insured in the case at bar comes under both the letter and the spirit of the Act of July 3, 1930."

In the *second* place, the argument of petitioner for the application of a so-called doctrine of strict limitation of the benefits of a public gratuity is wholly without support at law.

The war risk insurance policies and the law in general are entitled to the most liberal construction in favor of the insured. The foundation of this principle of law is laid in the case of *White* v. *United States*, 270 U. S. 175, quoted in petitioner's brief, in which Justice Holmes, speaking for the court says:

> "All soldiers were given a right to it, and the relation of the Government to them, *if not paternal, was at least avuncular.*"

The doctrine is well stated in the case of *United States* v. *Cox*, 24 Fed. (2) 944:

> "Cases dealing with ordinary contracts of insurance are generally not applicable when considering policies of war risk insurance. A

> policy of war risk insurance is more or less a gratuity from the Government and was so designed to be. The United States assumed all of the extraordinary risks of war, and issued for the minimum premium what might be termed combined accident and life insurance policies, largely in return for the sacrifice to be made by the men of the United States in defense of their country. These policies and the law generally are entitled to the most liberal construction in favor of a soldier. *United States* v. *Law* (C. C. A.), 299 Fed. 61."

This rule is applied to the construction of the policies themselves.

In *McNally* v. *United States*, 52 Fed. (2), 440 at page 443, it is said:

> "These policies of war risk insurance are entitled to liberal construction in favor of the soldier."

The court states in *United States* v. *Phillips*, 44 Fed. (2) 689, at page 692:

> "In view of the policy of the law often expressed by the courts, that these policies are to be liberally construed, we resolve any doubts we have in the matter in favor of the insured."

The rule of liberal construction is likewise applied to the construction of the World War Veterans' Act. *Glazgow* v. *United States*, 50 Fed. (2) 178:

> "The World War Veterans' Act is to be liberally construed in favor of the veterans.

> *White* v. *United States*, 270 U. S. 175; 46 Supreme Court 274, 70 L. Ed. 530; *United States* v. *Cox*, 24 F. (2) 944 (C. C. A. 5)."

In *United States* v. *LePage*, 59 Fed. (2) 165, at page 167, the court says:

> "The Government extended to those in the service during the World War every possible benefit and encouragement to protect themselves and their families against want in case of their death or disability while in the service. The several acts passed for this purpose should be construed liberally in favor of the man in the service and his dependents. The Government should not stand on narrow technicalities where the good faith of the parties is unquestioned. *United States* v. *Cox* (C. C. A.), 24 F. (2) 944."

A careful search of the reported cases involving the interpretation of war risk insurance policies and the World War Veterans' Act will disclose no such doctrine as that contended for by the government of a strict limitation of the benefits of a public gratuity, and the contention of the petitioner is not borne out by the citations in the petitioner's brief.

The Act of Congress of July 3, 1930, amending Section 307 of the World War Veterans' Act, requires a surrender of the subsequent contract as a condition precedent to receiving payment, after adjudication in the veteran's favor upon an action on the war risk insurance policy. If he has already surrendered the policy, there is no occasion to surrender it after judgment. Giving the act a liberal construction in favor of the insured, the fact that he has already surren-

dered the policy before judgment does not change the fact that he comes within both the letter and the spirit of the remedial legislation of July 3, 1930, which legislation is designed to permit the recovery of insurance upon a showing of meritorious right thereto.

4.

The Justice of the Cause.

In this case, the plaintiff was admittedly (by virtue of the verdict of the jury, and by virtue of the stipulation of counsel for the Government waiving in the court below all assignments of error with reference to that principal issue) totally and permanently disabled as a result of battle injury. While suffering the nervous and mental diseases which constituted his disability, the Government by solicitation through its agents, prevailed upon him to convert his insurance at a time when he was an inmate of a mental hospital, placed there by the Government for purposes of treatment.

Unable, because of his physical condition, to meet the premium payments, he surrendered the policy to the Government, receiving as a cash surrender value, only a small portion of the premiums which he had thus mistakenly paid.

The policies of insurance issued by the Federal Government were of two forms. The war risk term insurance carried no paid up or extended insurance values, and had no cash surrender value. At the end of the grace period, such contracts if not matured by death or disability, were of no further force or effect.

The policies of the Government upon the conversion of the war risk term insurance, pursuant to Section 512, Title 38, USCA, provided for cash surrender value, paid up insurance, extended insurance, and policy loan provisions. The governing paragraph of the policy, 5-a, is as follows:

> "(*a*) Upon written request therefor by the Insured made while this policy is in force or not later than three calendar months after the due date of the premium in default and upon complete surrender of this policy, with all claims thereunder, the United States will pay to the Insured the cash-surrender value thereof. The said cash-surrender value at the end of any policy year for which premiums have been paid in full, if no installments on account of total permanent disability have been paid, shall be the reserve together with any dividend accumulations left on deposit, less any indebtedness under this policy * * *"

After making provision for paid up insurance, if so desired, the policy continues:

> "(*c*) Upon default in payment of premium and the expiration of the grace period, if the policy has not been surrendered for a cash value or for paid-up insurance, this policy shall be extended *automatically* as Term Insurance payable in monthly installments for such time from the due date of the premiums unpaid as the cash surrender value will purchase when applied as a net single premium at the attained age of the insured The extended insurance

> **shall be with right to total permanent disability benefits and with right to dividends payable in cash only."**

The policy without reference to the original term insurance, except as physical examination was waived, was a contract unto itself, and the cash surrender or paid up value resulted solely from the accumulation of a reserve and dividends out of the premiums so paid upon the converted policy. For instance, at age 30, an insured could pay for $10,000 of insurance, by payments of $16.90 per month, or a total of $202.80 per year. At the end of one year's time, the policy could be surrendered and had a cash surrender value of $122.70, in other words, the cost of carrying the insurance for the year was $80.10, and the $122.70 constituted the reserve together with dividend accumulations. The $122.70 was available either as cash surrender value or to apply on paid up insurance, or was *automatically* available to extend insurance upon a term basis.

The cases out of which confusion arises with reference to the issue presented by this appeal are three—all arising in the Tenth Circuit.

United States v. *Andrews*, 43 Fed. (2) 80;
Watson v. *United States*, 45 Fed. (2) 589;
Long v. *United States*, 45 Fed. (2) 590.

It is evident from a reading of the decisions that they proceed from a conclusion arrived at in the Andrews case by Judges Lewis and Phillips with which Judge Cotteral, himself the writer of the opinion, was not in sympathy, and we believe that

they proceed from an ill-considered premise and are contrary to the evident intent of Congress in its enactment of Section 307 of the World War Veterans' Act.

In *United States* v. *Andrews,* 43 Fed. (2) 80, the first of the cases arising in the Tenth Circuit, after having had $10,000 term insurance, the appellee applied for and converted $2,000 of the insurance, and thereafter the converted policy was surrendered and its cash surrender value taken. The opinion reads:

> "We are not impressed by the contention that the original policy was extinguished except *pro tanto* by the converted policy for $2,000. There was no evidence of such an agreement, and we find no sanction for it in the statutes. We take the same view as was expressed in *United States* v. *Buzzard* (C. C. A.) 33 F. (2) 883, and therefore hold that, in any event there was no discharge of $8,000 of the term policy by the issuance of the converted policy. The plaintiff established at the trial such disability as entitled him to recover on the basis of insurance to that extent as a matured liability of the Government.
>
> "The discussion of counsel has centered about the converted policy. It is urged both that the appellee was estopped by his representations, and that the judgment should be reversed, in order to allow a prior disposition of the equitable issue upon that policy. The courts are not in harmony as to the regularity of trying such an issue in an action at law * * *"

After quoting Section 307, Judge Coteral continues:

> "This amendment clearly entitles the assured to recover on a term policy by a showing while it is in force of permanent total disability, upon surrender of a converted policy. The appellee has established such disability. He cannot literally meet the condition of surrendering the converted policy, because it has been previously surrendered. *It is the opinion of the writer hereof that he has offered an equivalent by returning the cash value of that policy paid to him, which represents the entire outlay of the Government, and he is entitled to recover on the basis of a total term insurance of $10,000.* The dominant purpose of the statute seems to the writer to be to allow such recovery, without prejudice from having mistakenly accepted a converted policy and enjoyed its benefits, whether in the way of insurance or payment of its surrender value."

While agreeing with Judge Cotteral in his general view of the statute, we call the attention of this court to the fact that the payment of the cash surrender value of the converted insurance does not represent an outlay on the part of the government. It constitutes only a return to the veteran who, by reason of the verdict of the jury, is shown to have been permanently totally disabled, of unearned moneys which he himself has entrusted to its care. As a matter of fact, the Government, upon the finding of the jury, should return to the veteran, who was so disabled at the time of payments, all moneys which were paid on account of premiums on the converted policies but the remedial legislation with reference to veterans' in-

surance has not yet reached that degree of fairness which authorizes action for the recovery of such premiums.

Judge Cotteral, in his opinion, continues, objecting to the judgment of the majority of the court—Judges Lewis and Phillips—and says:

> "But the amendment is construed differently by a majority of the court. They hold that appellee is entitled to recover upon his term policy only on the basis of $8,000 insurance. This is on the ground that he cannot now surrender the converted policy since he has enjoyed the benefits of insurance under it, and it stands as a contract fully performed and executed by the Government. These views of the case prevail and control the judgment of this court. The result is that in this case the judgment is held to be erroneous in awarding to appellee a recovery on the basis of insurance in excess of $8,000."

We submit that the unexpressed views of Judges Lewis and Phillips, as referred to by Justice Cotteral, were erroneous; that it was the purpose of Section 307 to allow full recovery for the full amount of war risk insurance carried to those persons who, as a result of injury within the period covered by the policy, suffered permanent total disability, and that the proviso of Section 307 was designed only to protect the Government against the circulation of its converted policies, when the insured named therein was at the time receiving the full benefit of the Government's insurance laws enacted for his benefit. In other words, no veteran was entitled to more than $10,000 in-

surance with the Government outstanding at any one time, and, having been compelled to pay upon the policy of war risk term insurance, all other subsequent contracts or policies should be surrendered into the hands of the Government, it making no difference whether the surrender antedated or was subsequent to the determination of liability upon the policy of war risk insurance. The surrender of the policy was the thing desired. As the trial court in this case said:

> "There is no use for this court to demand his doing something which he has already done" (C. C. A. Tr. 36).

The Tenth Circuit again had the matter before it in *Watson* v. *United States*, 45 Fed. (2) 589, Judge Phillips writing the opinion. In the Watson case there was a lapse of the term policy, and reinstatement thereof, and a second lapse of the policy. The court found that such reinstatement did not constitute an estoppel to claim total and permanent disability during the period of the original policy, and Judge Phillips, in accordance with his thought with reference to the issue presented in the Andrews case, distinguishes that case by saying:

> "By payment of such surrender value, the United States fully performed and discharged such converted policy. Since such converted policy had been discharged by performance, Andrews was unable to surrender it."

The same conclusion was reached in *Long* v. *United States*, 45 Fed. (2) 590.

This expression of Judge Phillips defines the misconception under which both he and Judge Lewis must have been laboring in their consideration of the Andrews case.

The Circuit Court of Appeals in the Tenth Circuit has taken the view in the Watson and Long cases that where the converted policy merely lapses; that is, where it continues on automatically until the cash surrender value is eaten up by application to continued insurance, the veteran is entitled to recover upon his original war risk term insurance because at that time he has a piece of paper in his hand, the legal force of which has expired, but he is nevertheless in a position to surrender it. While, if the veteran has surrendered the paper and instead of letting the Government have the portion of the premium which it has not earned, and which by the finding of the jury it had no right to receive, he takes the return of that premium, then in such case the veteran should be deprived of the benefits of his world war term insurance, which had accrued and which became payable during the period covered by the policy.

The two results, considering this phase of the policy and the evident intent and desire of the Congress, are entirely inconsistent, the one with the other, for under the program which treats the insurance as having been automatically surrendered; that is, by being eaten up in extended insurance, the veteran has, if he received anything, received something which he cannot surrender as much as if he had received cash surrender value. The converted contract is as fully performed in the one case as in the other.

The conclusion of the Tenth Circuit urged by the Government, for adoption by this Court, is, we submit, contrary to the spirit of the world war veterans' act, and specifically contrary to the demonstrated intent of Section 307 thereof, as amended.

It has been our thought that Judges Phillips and Lewis of the Tenth Circuit, who are the only judges so far as we have been able to determine of the inferior courts who have evidenced any sympathy with the Government's contention, could not have understood that these converted policies of insurance carried no value over from the original term insurance. We feel no hesitation in saying that their conclusion, as expressed by Judge Cotteral, in *United States* v. *Andrews,* 43 Fed. (2) 80, was ill-considered. As will be seen, Judge Cotteral, who wrote the opinion, was not in sympathy with the view of his associates. These judges could not have been cognizant of the actual fact that cash surrender value constituted merely a return to the veteran of a reserve, together with dividends thereon, which had been accumulated in its entirety since the date of conversion, out of money which, because of the veteran's condition as established by the verdict of the jury, the Government had no right to receive.

If the word "surrender" means to yield, render or deliver up, as contended by the petitioner's brief, p. 15, then we submit that all that the Government is interested in was the surrender or yielding up of the document which was the second contract, and that it serves the purpose of the Government as well that it be yielded before as after trial. The surrender is not

the thing in which the Government is interested. It is the prevention of a double recovery. The rule of decision for which we contend and the interpretation of the statute which we support has met the favor of the trial judge who was reversed in the case of *United States* v. *Andrews, supra,* of Judge Cotteral who wrote the opinion in that case, of Judge Neblett, himself of the Tenth Circuit, who heard this case in the District Court, and is the unanimous conclusion of the three judges who heard the case on appeal in the Ninth Circuit.

The interpretation contended for by the Government results in that Government's eating its cake and having it, too, for it has received the premiums which were required by the war risk term insurance, and thereafter in spite of the fact that the veteran to whom it wanted to evidence its liberality, has proven that he became totally and permanently disabled, during the life of the policy, it has accepted premiums from him upon a converted policy which it should not have received; it has paid him nothing in discharge of its insurance obligation. All that it has returned to the veteran is a portion of his own money.

By the strict construction contended for by the Government, if the policy had been lost or destroyed, there could be no strict surrender of the subsequent contract or policy, and yet the Government invites this court to adopt a construction which requires the actual "possession or ownership of the thing to be surrendered" (petitioner's brief, p. 16).

They say that when judgment was entered in the case at bar, the insured had no contract with the Gov-

ernment and did not own or possess the policy of which the statutes required surrender, as a condition precedent. The answer is that by the finding of the jury, he had an accrued right against the Federal government to recover insurance because of his disability. His right of a recovery is not predicated upon the possession of a converted policy. It is predicated upon total and permanent disability incurred at a time when a valid and subsisting contract was in force.

Another thing must be borne in mind. The surrender of his policies by Arzner, which surrender was made primarily necessary by reason of his physical condition and inability to pay, was made at a time prior to the legislative enactment of the right of election which is contained in Section 307 of the world war veterans' act, and he could not in receiving back his $45.20 on one policy and his $18.30 on another policy, have possibly appreciated the fact that he was thereby creating an election which would deprive him of all insurance benefits which had theretofore accrued. To impose upon him such an election as having been intelligently made, is to hold citizens to a knowledge of the actions of Congress before the fact and no court and no judge that we know of has ever imposed upon the humble citizen so unconscionable a burden.

Counsel argue that the Circuit Court of Appeals for the Ninth Circuit has failed to give effect to the underlying purpose of the statutory provision. We submit that it has sensed the true spirit of the act and given it its proper interpretation and effect. The purpose of the act was to permit a recovery of insurance if the

facts warranted it. The proviso was to bar a double recovery.

The decision of the Circuit Court accomplishes this result; the veteran recovers insurance benefits on only one policy. The return of his unearned premiums and the dividends thereon, is certainly not the recovery which the Congress had in mind.

Counsel for the government say that since the lower court did not remit from the amount of the judgment the amounts paid to the respondent as the cash surrender value of the converted policy, that *ipso facto* the lower court has construed Section 307 as amended not only to permit recovery, on the original policy, but *to require* the government to return to the veteran the cash surrender accrual of the converted policy.

The lower court has not gone so far as to say that the government is *required* to pay to the veteran the cash surrender value of a converted policy. It has only said:

> "The fact that he has surrendered it for a paltry consideration which represents the return to him of a portion of the premium which he should never have been required to pay in the first place, does not change the fact that he comes within the letter of the statute in that he has surrendered the subsequent policy."

As a matter of justice, there should be remedial legislation to permit of the recovery by the veteran situated as respondent is, of all of the sums which he paid as premiums upon the converted policies; and counsel for the government in making the contention

which they do make, lose sight of the entire thought and purpose of the World War Veterans' Act.

The court below is certainly right where it says:

> "Under the situation, the insured has been paying the government, where upon the facts as found by the jury, the government should have been paying him."

It was such conditions that the Congress intended to remedy by its legislation.

The petitioner's entire argument to the effect that since the converted policy has been fully performed, there can be no surrender, loses its entire force when we consider that any policy held, and suffered to lapse for nonpayment of premium is none the less continued in force *automatically* as term insurance until the cash surrender value has been absorbed, and is consequently as fully performed as was any contract surrendered for cash surrender value, and yet in the one instance, the government would be willing to pay because the veteran holds the paper, while in the other instance, it would not be willing to pay because the veteran has already given the government the paper.

We cannot agree with counsel's contention that Section 310 of the World War Veterans' Act as added to the statute by the act of May 29, 1928, C-875, 45 Statutes, 970; (U. S. C. Supplement 5, Title 38, Section 512-a) destroys the right which was designed to be accomplished by the remedial legislation under consideration and enacted in 1930. It applied to converted insurance only and has no application to the legislative intent here.

This is conceded by the petitioner (Brief, p. 19). The reasons prompting the enactment of Section 310 are many and take us into fields wholly removed from the legislative intent and purpose supporting the enactment of the law under consideration here.

Counsel complain that the decision of the Circuit Court represents an application of the doctrine of strict construction, which ordinarily applies to insurers. We do not believe that there is any evidence on the part of the court below to adopt a strict construction. Rather it is a liberal construction in accordance with the benevolent character of the legislation which has marked the Government's desire and intention towards its veterans, and especially of its desire and intention to accord ample justice to those veterans who *do not found their case upon a gratuity,* but base it upon a contract by which the sovereign Government agreed to pay them certain indemnity in the event that they should suffer a total and permanent disability while serving that Government during the period of a great emergency. That Government has been liberal in extending the time within which such actions might be brought; it has abolished the defense of estoppel by reason of conversion of the policy, and has enacted many more beneficent measures, all of which only evidence the liberality which the Congress as well as the people of this nation, desire to extend to those *veterans who were willing to stand the fair cost of the hazard of war,* which they did stand, in the premiums which they paid for their war risk insurance.

The spirit of our people and of our Congress is not one which calls for the application of "strict limitation

of the benefits of a public gratuity to those who can clearly meet the statutory requirements," rather the very evident purpose of the Congress and the law is to waive all strict limitations in behalf of the accomplishing of a substantial justice.

At page 21 of Petitioner's brief, in discussing gratuities, counsel say:

> "The statute upon which the suit is predicated was enacted upon the assumption that the rights of the veterans such as the respondent upon their original term policies had been extinguished by the subsequent reinstatement and conversion of the insurance."

We do not follow counsel in this assumption. If this law presupposed no liability under the original policy, why then is the veteran given the right to sue upon the prior policy? Why is that right recognized? Why is he permitted to prosecute it, occupying the time of courts and juries? The right to sue upon an extinguished cause of action is nothing more nor less than a meaningless gesture.

We submit that the statute was passed in recognition of an existing right if it had matured by disability, and through a desire to permit the accomplishing of justice without the intervention of technicalities.

The anomaly of the technical construction contended for by the government is evident in the following quotation (Petitioner's brief, p. 22):

> "The Government of course, does not question the right of a veteran who has converted his term insurance, to sue upon his prior policy,

> even if he has allowed the converted policy to lapse, provided he surrenders the converted policy."

What possible difference in justice can there be between the two provisions: (1) provided he surrenders his converted policy, and (2) provided he has surrendered his converted policy. The Congress has clearly expressed itself to the effect that the veteran who has converted his term insurance may *sue on* his prior policy, even if he has allowed his converted policy to lapse, this without reference to surrender.

The court and the jury and the Government are not under the law to be concerned as to his converted policy until the issue is determined as to whether or not he has a right to recover upon the term insurance contract upon which he sues. Then and then only after the right has been established, it will be incumbent upon the veteran, if he has not theretofore surrendered the converted policy, to surrender the same.

In the case of Arzner he has surrendered the converted policy and yet the Government says to him: you have a cause of action. The law clearly permits it. You may prosecute it to judgment, but after you have done these things, you cannot recover because you cannot twice surrender that which you have surrendered.

The Congress intended no such absurd result. The decision of the Circuit Court of Appeals for the Ninth Circuit, is a well-considered opinion, properly reflecting the spirit and intent of the Congress and accomplishing that degree of justice which all right-thinking citizens must favor.

Conclusion.

We submit that the decision of the Circuit Court of Appeals should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 191.—October Term, 1932.

The United States of America, Petitioner, *vs.* Clarence P. Arzner.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[January 9, 1933.]

Mr. Justice McReynolds delivered the opinion of the Court.

Respondent Arzner enlisted in the Army March 29, 1918, and was discharged January 16, 1919. While in the service he took out a war-risk insurance policy for $10,000 on which premiums were paid through January, 1919. The policy lapsed; but March 1, 1920, it was reinstated and then converted into an ordinary life policy. Premiums upon the latter were paid through February, 1921. The respondent then gave up $5,000 of it and received the cash surrender value—$45.00; he surrendered the remaining $5,000 in December, 1921, and accepted the cash value—$18.30.

March 5, 1929, he began this proceeding in the United States District Court. He alleged total disability, resulting from injuries received in battle, commencing in 1918 and sought recovery under his original war-risk insurance policy of 1918—$57.50 per month.

Upon properly framed issues the cause went to trial in June, 1931. The jury found respondent's total and permanent disability commenced September 29, 1918, and returned a verdict in his favor. An appropriate judgment followed; the Circuit Court of Appeals, Ninth Circuit affirmed.

Because of conflicting views in the Circuit Courts of Appeals we granted certiorari.

Here, it is said, that the court below erred in holding that respondent was entitled to recover upon his original policy since at the time final judgment went down he could not surrender the converted policy as required by Section 307, Amended World War

Veterans' Act 1924; c. 320, 43 Stat. 607, 627; Act July 3, 1930, c. 849, 46 Stat. 991, 1001. The facts are not in dispute.

Prior to July, 1930, Federal courts held divergent views concerning the rights of veterans whose original term insurance polices had lapsed and thereafter had been reinstated or converted into some other form. *Stevens* v. *United States,* 29 F. (2d) 904; *United States* v. *Buzard,* 33 F. (2d) 883; *United States* v. *Kusnierz,* 33 F. (2d) 887; *United States* v. *Cross,* 33 F. (2d) 887; *United States* v. *Allen,* 33 F. (2d) 888. *United States* v. *Barker,* 36 F. (2d) 556; *Duggan* v. *United States,* 36 F. (2d) 804; *Franks* v. *United States,* 43 F. (2d) 455. *United States* v. *Golden,* 34 F. (2d) 367; *United States* v. *Acker,* 35 F. (2d) 646; *United States* v. *Schweppe,* 38 F. (2d) 595, *Woolfolk* v. *United States,* 44 F. (2d) 701; *Crawford* v. *United States,* 40 F. (2d) 199; *United States* v. *Andrews,* 43 F. (2d) 80.

With the evident purpose to accord liberal treatment to those veterans who at any time had become entitled to receive benefits under any insurance policy, Congress by the Act of July 3, 1930, amended World War Veterans' Act, *supra,* so as to read—

> "All contracts or policies of insurance heretofore or hereafter issued, reinstated, or converted shall be incontestable from the date of issuance, reinstatement, or conversion, except for fraud, nonpayment of premiums, or on the ground that the applicant was not a member of the military or naval forces of the United States, and subject to the provisions of section 23; Provided, That the insured under such contract or policy may, without prejudicing his rights, elect to make claim to the bureau or to bring suit under section 19 of this Act on any prior contract or policy, and if found entitled thereto, shall, upon surrender of any subsequent contract or policy, be entitled to payments under the prior contract or policy; Provided further, That this section shall be deemed to be effective as of April 6, 1917, and applicable from that date to all contracts or policies of insurance."

When the trial court rendered final judgment respondent had given up his converted policy and therefore could not surrender it again. For petitioner it is said, that being unable to comply with the literal terms of the 1930 amendment he could not

recover under the original (1918) policy. Also—"The Government, of course, does not question the right of a veteran who has converted his term insurance to sue on his prior policy, even if he has allowed the converted policy to lapse, provided he surrenders the converted policy." The suggested construction of the statute is too narrow. It would deprive veterans of a right which we think Congress intended to confer. The probable reason for requiring surrender of the subsequent contract or policy was to prevent any further claim and thus silence controversy.

Undoubtedly, respondent became entitled in September, 1918, during the life of his original policy, to the benefits therein provided. And we think Congress by the Act of 1930 intended to permit him to assert the right which then accrued. To deprive him of this simply because he could not actually surrender a writing already delivered to the United States would defeat the generous purpose behind the enactment.

True it is, respondent agreed to cancellation of his converted policy and accepted the surrender value—a portion of the money paid by him for premiums thereon. But this action worked no material disadvantage to the Government. Indeed the veteran made payments when in fact entitled to receive monthly benefits for total disability. If the converted policy had been allowed finally to lapse because of nonpayment of premiums, the agreement between the parties would have been fully complied with. Nevertheless the proper admission is that under such circumstances there could have been a recovery on the original policy, upon actual surrender of the expired policy. The Government now has possession of the cancelled converted policy and is in no worse position than it would be in the supposed circumstances.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.